SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA
Los Angeles

GIFT OF

Roscoe Pound

CASES

ON

FEDERAL PROCEDURE

TOGETHER WITH

JUDICIAL CODE, EQUITY RULES, FORMS AND QUESTIONNAIRE

BY

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CHICAGO

CALLAGHAN AND COMPANY

1921

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PREFACE

This book has been compiled primarily for use in the class room. Therefore its size has been kept within such a limit that it can all be covered in two recitations a week for half of a school year. As a result, only the more important sections of the Judicial Code have been covered thoroughly, and cases have not been included on points which are obvious.

The notes presented in connection with the reprinted cases are not intended to be lists of cases in accord with them, but rather to show when there are cases contra to them, and to give illustrations of variations of the problems dealt with in them.

Only those portions of the cases which are relevant to the points which are intended to be illustrated by them are set forth. Names and arguments of counsel are omitted, as are long lists of cited cases. In many instances the facts have been restated.

The Judicial Code has been included, so that it may be available for ready reference.

The Equity Rules, and certain forms illustrating them, have been reprinted so that, if time permits, some work may be done along the practical lines of Federal Procedure. A large number of forms have not been reprinted, since the students using this book would not have the time to study them accurately.

I gratefully acknowledge the kindness of Dean Roscoe Pound and Professor Joseph H. Beale of the Harvard Law School in responding to my requests for advice. The inclusion of certain portions of this book, as well as the form given to some of the indexes, is due to that correspondence.

CARL C. WHEATON.

Cincinnati, Ohio, August 1, 1920.

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Cases on Federal Procedure

CHAPTER I.

INTRODUCTION.

SECTION I.

Miscellaneous Cases.

MARTIN v. HUNTER'S LESSEE.

Supreme Court of the United States. 1816.

14 U. S. (1 Wheaton) 304, 4 L. Ed. 97.

Story, J.,[1] delivered the opinion of the court.

The third article of the Constitution is that which must principally attract our attention. The first section declares, "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may, from time to time, ordain and establish." The second section declares, that "the judicial power shall extend to all cases in law or equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under the grants of different States; and between a State or the citizens thereof, and foreign States, citizens, or subjects." It then proceeds to declare, that

[1] Only a portion of the opinion is reprinted.—Ed.

"in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that Government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon States; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? "The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions; it must be in the negative. The object of the Constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but

might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the Constitution, they might defeat the Constitution, itself; a construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the Constitution, in defining the powers of the other co-ordinate branches of the Government. The first article declares that "all legislative powers herein granted shall be vested in a Congress of the United States." Will it be contended that the legislative power is not absolutely vested? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power shall be vested in a president of the United States of America." Could Congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department.

If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power.[2] The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on

[2] Compare Long's Federal Courts (3rd Ed.), Sec. 39, pp. 54-55.—Ed.

State courts) could not reach those cases, and, consequently, the injunction of the Constitution, that the judicial power "shall be vested," would be disobeyed. It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are "the judicial power shall extend," etc. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American people had not made any previous grant. The Constitution was for a new government, organized with new substantive powers, and not a mere supplementary character to a government already existing. The consideration was a compact between States; and its structure and powers were wholly unlike those of the National Government. The Constitution was an act of the people of the United States to supersede the confederation, and not to be ingrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, etc., that the Supreme Court shall have original jurisdiction." Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds—"in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall

make." The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a dif-

ference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the Constitution, laws, and treaties of the United States. Here the State courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively

given, least it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might, in their wisdom, choose to apply. It is also worthy of remark, that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject matter; in the second, it is made materially to depend upon the value in controversy.[3]

MECHANICS' AND TRADERS' BANK v. UNION BANK.

Supreme Court of the United States. 1874.

89 U. S. (22 Wallace) 276, 22 L. Ed. 871.

MR. JUSTICE STRONG delivered the opinion of the court.

The facts of this case, so far as they are necessary to a proper understanding of the question raised, are the following:

In May, 1862, after the capture of New Orleans by the United States army, General Butler, then in command of the army at that place, issued a general order appointing Major J. M. Bell, volunteer aid-de-camp, of the division staff, provost judge of the city, and directed that he should be obeyed and respected accordingly. The same order appointed Captain J. H. French provost marshal of the city, and Captain Stafford deputy provost marshal. A few days after this order the Union Bank lent to the plaintiffs the sum of $130,000, and subsequently, the loan not having been repaid, brought suit before the provost judge to recover the debt. The defence was taken that the judge had no jurisdiction over

3 Mr. Justice Miller, delivering the opinion of the court in the United States v. Union Pacific R. R. Co., 98 U. S. 569, 602-603, 25 L. Ed. 143, 150 (1878), said: "With the exception of the Supreme Court, the authority of Congress in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution."—Ed.

civil cases, but judgment was given against the borrowers, and they paid the money under protest. To recover it back is the object of the present suit, and the contention of the plaintiffs is that the judgment was illegal and void, because the Provost Court had no jurisdiction of the case. The judgment of the District Court was against the plaintiffs, and this judgment was affirmed by the Supreme Court of the State. To this affirmance error is now assigned.

The argument of the plaintiffs in error is that the establishment of the Provost Court, the appointment of the judge, and his action as such in the case brought by the Union Bank against them were invalid, because in violation of the Constitution of the United States, which vests the judicial power of the General Government in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and that under this constitutional provision they were entitled to immunity from any liability imposed by the judgment of the Provost Court. Thus, it is claimed, a Federal question is presented, and the highest court of the State having decided against the immunity claimed, our jurisdiction is invoked.

Assuming that the case is thus brought within our right to review it, the controlling question is whether the commanding general of the army which captured New Orleans and held it in May, 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes. Did the Constitution of the United States prevent the creation of civil courts in captured districts during the war of the rebellion, and their creation by military authority?

This cannot be said to be an open question. The subject came under consideration by this court in The Grapeshot,[1] where it was decided that when, during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and it was ruled that a court instituted by President Lincoln for the State of Louisiana, with authority to hear, try, and determine civil causes, was lawfully authorized to exercise such jurisdiction. Its establishment by military authority was held to be no violation of the constitutional provision

[1] 9 Wallace 129.

that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupancy of the conquering army. It refers only to courts of the United States, which military courts are not. As was said in the opinion of the court, delivered by Chief Justice Chase, in The Grapeshot, "It became the duty of the National Government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide, as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice. The duty of the National Government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent. It was a military duty, to be performed by the President, as commander in chief, and intrusted as such with the direction of the military force by which the occupation was held."[1]

In re BARRY.

Circuit Court, S. D. New York. 1844.

42 Fed. 113.

BETTS, J.[2]— These sovereignties are left entire, under the action of the General Government, except in so far only as the powers are transferred to the Federal head by the Constitution, or are by that prohibited to the States, or, in some few instances, are allotted to be exercised concurrently by the two governments. The United States judiciary is constituted and put in action in the several States, in subordination to this fundamental principle of

[1] Only a portion of the opinion is reprinted.

Mr. Justice Field dissented on the ground that the Provost Court had not jurisdiction in civil cases.

See also Santiago v. Nogueras, 214 U. S. 260, 263-367, 29 S. Ct. 608, 53 L. Ed. 989, 990-991 (1909).

Compare Walsh v. Porter, 68 Tennessee (12 Heiskell) 401 (1873); Narciso Basso v. The United States, 40 Ct. Cl. 202, 212 (1905).—Ed.

[2] Only a portion of the opinion is reprinted.—Ed.

the Union, and empowered to exercise only such peculiar and special supremacy, and not one in its absolute sense. To render this connection of the United States judiciary with that of the States more intimate and entire, and to take away all implication that it was a paramount power, acting irrespective of State laws, or that it possessed, or could exercise, any inherent jurisdiction countervailing those laws, the act of Congress organizing the courts establishes it as an element in their procedure that the laws of the State where the court sits shall be its rule of decision in common-law cases. It necessarily results, as a consequence of this special character of the United States judiciary, that it can possess no powers other than those specifically conferred by the Constitution or laws of the Union, and such incidents thereto as are necessary to the proper execution of its jurisdiction. All other judicial powers necessary to the complement of supreme authority remain with, and are exercised by, the States. This doctrine is sufficiently indicated in the decision of the Supreme Court made in this case at the last term, and it has been invariably recognized from the earliest adjudications of the court. Chisholm v. Georgia, 2 Dall. 432, 435; Ex parte Bollman, 4 Cranch 75; Ex parte Watkins, 3 Pet. 201; Kendall v. U. S., 12 Pet. 524. The jurisdiction of the United States courts depends exclusively on the Constitution and laws of the United States, and they can neither in criminal nor civil cases resort to the common law as a source of jurisdiction. U. S. v. Hudson 7 Cranch. 32; U. S. v. Coolidge, 1 Wheat. 415; Chisholm v. Georgia, 2 Dall. 432; Ex parte Bollman, 4 Cranch 75; Town of Pawlet v. Clark, 9 Cranch 333; Ex parte Randolph, 2 Brock. 477; Craig v. Missouri, 4 Pet. 444; Wheaton v. Peters, 8 Pet. 658; The Orleans v. Phoebus, 11 Pet. 175; Kendall v. U. S., 12 Pet. 524.

It is now argued that this principle is limited to the Supreme Court, but that, in respect to the circuit courts, they have a common-law jurisdiction incident to their constitution, inasmuch as judicial sovereignty resides in them, rendering the range of their original jurisdiction coextensive with the subjects of litigation arising under the Constitution and laws of the United States, and because all remedies not otherwise provided are, in the exercise of that judicial sovereignty, to be in conformity to the common law. Although the speculations of our most eminent jurists may countenance this argument (Dup. Jur. 85; 1 Kent, Comm. 341), yet it has not received the sanction of the United States courts. Chisholm v. Georgia, 2 Dall. 435; Kendall v. U. S., 12 Pet. 616, per curiam, and 626, Chief Justice Taney; Ex parte Bollman, 4

Cranch 75; Chief Justice MARSHALL, Ex parte Randolph, 2 Brock. 477; Lorman v. Clarke, 2 McLean, 569. The distinction established by the cases is clear and practical, and embraces all United States courts alike, and is, in effect, that those courts derive no jurisdiction from the common law, but that, in those cases in which jurisdiction is appointed by statute, and attaches, the remedies in these courts are to be according to the principles of the common law. Bains v. The James and Catherine, 1 Baldw. 558; Robinson v. Campbell, 3 Wheat. 223; U. S. v. Hudson, 7 Cranch 32; Ex parte Kearney, 7 Wheat. 38; Anderson v. Dunn, 6 Wheat. 204; Ex parte Randolph, 2 Brock. 477. It is not, accordingly, conclusive of their right to take cognizance of the subject-matter, to show that the parties connected therewith are competent to sue or be sued in the United States courts, and that there is perfect right of action or defense thereupon supplied such parties at common law. The evidence must go further, and prove that the particular subject-matter is one over which the courts are by act of Congress appointed to act, or that the question has relation to the remedy alone, and not to the jurisdiction of the court. U. S. v. Bevans, 3 Wheat. 389; McCulloh v. Maryland, 4 Wheat. 407; Rhode Island v. Massachusetts, 12 Pet. 721.[1]

UNITED STATES v. BURLINGTON AND HENDERSON COUNTY FERRY CO.

District Court, S. D. Iowa. 1884.

21 Fed. 331.

LOVE, J.—In order to give jurisdiction to a Federal Court in any case whatever, the Constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or the law. The two must co-operate; the Constitution as the fountain, and the laws of Congress as the streams from which

[1] Compare Fitch v. Creighton, 65 U. S. (24 Howard) 159, 162, 16 L. Ed. 596, 598 (1860).

To the effect that "in the construction of the laws of Congress, the rules of the common law furnish the true guide," see Rice v. Railroad Company, 66 U. S. (1 Black) 358, 374-375, 17 L. Ed. 147, 152 (1862).

Federal Courts, having been given power to act, may look to the common law to determine the proper mode of procedure, when no procedural provisions are made by Congress. State of Pennsylvania v. Wheeling, etc., Bridge Co., 54 U. S. (13 Howard) 518, 563-565, 14 L. Ed. 249, 268 (1851).

and through which the waters of jurisdiction flow to the court. This results necessarily from the structure of the Federal Government. It is a Government of granted and limited powers. All powers not granted by the Constitution to the Federal Government nor prohibited to the States are reserved to the States or the people. The great residuum of legislative, executive, and judicial power remains in the States. With respect to the Federal Government, the question always is, what powers are granted? with regard to the States, what powers are prohibited? [1]

DRED SCOTT v. SANDFORD.

Supreme Court of the United States. 1857.

60 U. S. (19 Howard) 393, 15 L. Ed. 691.

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.[2]

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defend-

1 Only a portion of the opinion is reprinted.—Ed.

2 Only a portion of the opinion is reprinted.—Ed.

ant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined; and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error; and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court.

But, in making this objection, we think the peculiar and limited jurisdiction of the courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England, and in the different States of the Union which have adopted the common-law rules.

In these last-mentioned courts, where their character and rank are analogous to that of a Circuit Court of the United States; in other words, where they are what the law terms courts of general jurisdiction; they are presumed to have jurisdiction, unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the

plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now, it is not necessary to inquire whether in courts of that description a party who pleads over in bar, when a plea to the jurisdiction has been ruled against him, does or does not waive his plea; nor whether upon a judgment in his favor on the pleas in bar, and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common-law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts, in questions of jurisdiction, stand on different principles and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings.

This point was decided in the case of Bingham v. Cabot (in 3 Dall. 382), and ever since adhered to by the court. And in Jackson v. Ashton (8 Pet. 148), it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of Capron v. Van Noorden (in 2 Cr. 126), and Montalet v. Murray (4 Cr. 46), are sufficient to show the rule of which we have spoken. The case of Capron v. Van Noorden strikingly illustrates the difference between a common-law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it, and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court, unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.[1]

[1] The facts essential to support the jurisdiction of the federal court need not be averred. It is sufficient if they appear somewhere in the record, but one must be careful to determine what is, and what is not, properly a part of record. Robertson v. Cease, 97 U. S. 646, 648, 24 L. Ed. 1057, 1058 (1878); Denny v. Pironi, 141 U. S. 121, 11 S. Ct. 966, 35 L. Ed. 65 (1891); Gordon v. Third National Bank, 114 U. S. 97, 98, 103, 12 S. Ct. 657, 658, 659, 36 L. Ed. 360, 361-362 (1892).

As to the presumption of jurisdiction in proceedings not collateral, see Robertson v. Cease, 97 U. S. 646, 649-650, 24 L. Ed. 1057 (1878). But, as to collateral proceedings, see The Chemung Canal Bank v. Judson, 8 N. Y. (4 Selden) 254, 258-262 (1853).

The federal courts may, of their own accord, raise the question of jurisdiction. King Bridge Co. v. Otoe County, 120 U. S. 225, 226, 7 S. Ct. 552, 30 L. Ed. 623, 624 (1887).

The question of jurisdiction is one independent of the merits. Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288, 291-292, 76 C. A. 172, 175-176 (1906).

As to the burden of proving jurisdiction, see Wiemer v. Louisville Water Co., 130 Fed. 244 (1903).—Ed.

CHAPTER II.

DISTRICT COURTS.

SECTION I.

Organization.

McGLASHAN v. UNITED STATES.

Circuit Court of Appeals, Seventh Circuit. 1896.

71 Fed. 434, 18 C. C. A. 172.

Jenkins, Circuit Judge, after stating the facts, delivered the opinion of the court.

The sole question presented for decision to the court below was whether the surety was relieved from the obligation of the recognizance by reason of certain proceedings of the District Court of the United States for the district of Kansas, subsequent to the alleged forfeiture of the recognizance, which resulted in the entry by that court of a *nolle prosequi*. We are relieved from the necessity of passing upon the correctness of the conclusion reached by the court below, because we are satisfied that, upon grounds not presented to the consideration of the Circuit Court, and neither considered nor determined there, the action cannot be maintained. By the second section of chapter 13 of an act approved January 6, 1883, entitled "An act to provide for holding a term of the District Court of the United States, at Wichita, Kansas, and for other purposes," it is provided that a certain part of the Indian Territory (within which the offense charged against McGlashan was committed) should be annexed to and constitute part of the United States Judicial District of Kansas, and that the United States District courts at Wichita and Ft. Scott, in the district of Kansas, should have original jurisdiction of the offenses committed within the limits of the territory so annexed to the district of Kansas. The act also provided that there should be one term of

the United States District Court for the district of Kansas held at Wichita in each year on the first Monday of September. 22 Stat. 400. The Act of March 3, 1879 (20 Stat. 355, c. 177), provided that there should be one term of the United States District and Circuit courts for the district of Kansas held in the City of Ft. Scott in each year, to be held on the second Monday of January. This statute, however, provided that no cause, action, or proceeding should be tried or considered in that court unless by consent of all the parties thereto, or by order of the court for cause. This was the condition of the law, with respect to the terms of court to be held at the two places named, at the time that this recognizance was entered into. By an act of Congress, approved June 9, 1890 (26 Stat. 129, c. 403), the district of Kansas was divided into two divisions, to be known, respectively, as the First and Second divisions of the district of Kansas, these divisions, respectively, embracing certain counties named. The city of Wichita was located within the Second division, and the act provided that the terms of the Circuit and District courts for that district should be held in the Second division of the city of Wichita on the first Monday of March and the second Monday of September in each year. It is provided by Rev. St. § 573, that "no action, suit or process in any District Court shall abate or be rendered invalid by reason of any acts changing the time of holding such courts; but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof." For some reason not made known to us the District Court of the United States for the district of Kansas convened at Wichita on the first Monday of September, 1890, and held a session at which this recognizance was forfeited for nonappearance of the principal therein, and this attempted forfeiture took place before the second Monday of September, the date specified in the act of June 9, 1890.

We are unable to understand by what authority of law the District Court was convened upon the first Monday of September, 1890. It is true that the act of June 9, 1890 (26 Stat. 129), does not in terms repeal the provision in the act of January 6, 1883 (22 Stat. 400), providing for a term of the court at Wichita upon the first Monday of September, but it manifestly has the effect to repeal that provision. It provides for two terms annually in the Second division of the district,—one on the first Monday of March, and the other on the second Monday of September, in each year. It would be a strange conclusion to hold that the Congress intended to allow the former act to remain in force with respect to the sit-

ting of the court on the first Monday of September, when by the latter act two terms were appointed to be held in each year, in that division, and at Wichita,—one of them upon the second Monday of September. The act covered the subject of the terms of court to be held at Wichita, and embraced new provisions, clearly indicating that it was intended as a substitute for all previous provisions designating terms of court to be held at Wichita. It therefore necessarily operated to repeal the former provision. Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207; District of Columbia v. Hutton, 143 U. S. 18, 26, 12 Sup. Ct. 369. The session of the court, therefore, which was assumed to be held on the first Monday of September, was held without authority of law, and its proceedings were inoperative and void. There was no obligation upon the part of the principal in the recognizance to appear on the first Monday of September, for, although that was the date stated in the recognizance at which the term was to be held, yet by force of the general provision in the statute to which we have referred, and by the very terms of the recognizance, his obligation was to appear at the next term appointed by law to be held, which was upon the second Monday of September. It was not possible that the court could, prior to the time appointed by law for the holding of the term, legally declare a forfeiture of the recognizance. His sureties were not required to produce their principal except at a term of the court authorized by law. The date for the sitting of the court having been changed subsequently to the execution of the recognizance, by force of the statute the recognizance was effectual to require his appearance at the changed date for the sitting of the court, and could not be forfeited prior to that date. It is clear to us that the court which declared the forfeiture in advance of the date fixed by law for the convening of the court was acting without authority of law, and that the forfeiture declared was of no effect. The judgment must therefore be reversed, and the cause remanded, with directions to the court below to render judgment for the plaintiff in error upon the findings of the court.

U. S. v. LOUGHERY.

Circuit Court, E. D. New York. 1876.

26 Fed. Cas. No. 15,631, p. 998, 13 Blatchford, 267.

BENEDICT, District Judge.—The defendants were jointly indicted with one Lewinski for coining. All three were put upon

trial together, at the November term. After several jurors had been called and challenged, and three had been found competent and sworn, the panel was found to be exhausted by reason of challenges. The hour being late, on the last day of the term, the court, in pursuance of section 746 of the Revised Statutes, directed that the trial of the cause be continued on the following day, notwithstanding that such following day was the commencement of the December term. The court also directed the marshal to summon talesmen to fill the panel. On the day following, the marshal returned the names of twenty-four persons as in court ready to serve as talesmen. The names of those persons were than placed in the box, and from those ballots names were drawn to complete the jury. Those persons so drawn, as they were called to be sworn in the cause, were each challenged by the prisoners. Upon the trial of such challenge, it was proved, by the oath of each juryman, that he was not in the court room, or about the court house, on the previous day, when the order for talesmen was made, but had been summoned by the marshal to attend, and when so summoned was not in the court room or about the court house. These challenges were overruled. Thereupon, after the full number of jurors had been sworn, the defendants claimed the right to challenge the array, and to prove by the marshal that the persons summoned by him, in pursuance of the order for talesmen, were not bystanders when so summoned. The challenge to the array was rejected, and the trial proceeded. After the evidence on the part of the Govvernment was for the most part completed, and during the night, these two defendants broke jail and escaped from custody. Thereupon, their counsel objected to further proceedings upon the indictment, in the absence of the prisoners. The objection being overruled, the counsel for these defendants withdrew, and the trial proceeded. The jury thereafter found a verdict of guilty against all three accused, and the one still in custody was thereupon sentenced. Subsequently, the prisoners who had escaped were caught and brought into court for sentence, whereupon this motion in arrest of judgment is made, upon the following grounds: First, that there was a mistrial, because the trial was not commenced before a jury or the court at the November term, within the meaning of section 746 of the Revised Statutes, since but three jurymen had been sworn when the term ended, and there was, therefore, no power to continue the trial upon the subsequent day. A jury, it is said, consists of twelve men, and section 746 has no application to a case where a full jury is not impanelled before the term ends.

The statute provides, that, when a trial has been commenced, and is in progress, before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the court: and I am of the opinion that the trial of this cause was commenced and in progress at the November term, within the meaning of the statute. When a juryman is sworn in a cause, a trial is commenced—perhaps, when one juryman is drawn from the box. Here, several jurymen had been drawn, challenges had been taken and tried, and three jurymen had been accepted and sworn. Upon these challenges, questions of law had been raised, and objections taken, which formed part of the record. This trial was, therefore, in progress before either the court or the jury, and, as I consider, was in progress before a jury, within the meaning and intent of the act. It was, therefore, lawfully proceeded with, as if another stated term had not intervened.[1]

KNOTTS v. VIRGINIA-CAROLINA CHEMICAL CO.

Circuit Court of Appeals, Eighth Circuit. 1913.

204 Fed. 926, 123 C. C. A. 248.

PRITCHARD, Circuit Judge.

We will now consider the twelfth assignment of error, to wit, that the court below erred in allowing judgment to be entered in this case on the 31st day of July, 1912, in favor of the plaintiff and against the defendants, upon the ground that the judgment was rendered during vacation, and not at a regular term of the court. It is argued in support of this contention that inasmuch as, under the rules of the District Court of the United States for the district of South Carolina, judgment by default may be entered at rules and during vacation, yet the court was not authorized to enter final judgment during vacation, and only had the power to direct the same to be enrolled on the judgment docket, and that a final judgment could not be entered until the next term of the court.

It appears, as we have stated, that after service of the answer, and of plaintiff's reply thereto, the plaintiff, upon notice duly given, moved for an order overruling the answer as frivolous, and

[1] Only a portion of the opinion is reprinted.—Ed.

for judgment thereon. While this motion was noticed for and heard upon the rules day in July, the order of the learned judge who heard the case below was not entered until the 22d day of July, 1912. It further appears from the certificate of the clerk of the District Court that pursuant to said order judgment was entered in favor of the plaintiff and against the defendants on the 31st day of July, 1912, at which time the court was still in session. That the presiding judge, at rules and during vacation, had the power to adjudge that the answer was frivolous, is undoubtedly true; and this is all that the court did during vacation. It further appearing that after this action had been taken by the court, and the case placed upon the docket, a final judgment was entered while the court was in session, we are of the opinion that the action of the lower court was proper.

Being of the opinion that the court below was in error as to the claim for attorney's fees, it follows, from what we have said, that the judgment in favor of the plaintiffs, except the amount claimed to be due as attorney's fees, should be affirmed, and the judgment as to this amount should be reversed.[1]

In re STEVENSON.

At Chambers in St. Louis, Mo. 1903.

125 Fed. 843.

Stevenson made an application for a writ of habeas corpus to secure his release from the United States penitentiary at Ft. Leavenworth, Kan., where he was serving out a term of imprisonment imposed upon him on May 13, 1901, by Judge Thomas. The judge had been assigned to hold a term of court, which was to end on May 4, 1901. He adjourned the court to May 6, 1901, and, as above stated, sentenced Stevenson thereafter. Stevenson claimed that the judge had no power to thus sentence him, since the original term of court had expired when this was done, and at that time the judge was not holding a special term of court. If he had been holding a special term of court when the sentence was imposed, it would have been valid according to a Federal statute.

[1] Only a portion of the opinion is reprinted.—Ed.

THAYER, Circuit Judge.—It is said, however, that on May 4, 1901, no formal order was made prolonging the term or appointing a special session, but that the court merely adjourned to the following Monday. Such action on the part of Judge Thomas was fully tantamount, in my judgment, to ordering a special session to begin the following Monday. The law looks at the substance of things, rather than the form, and, where a court possesses the power to appoint and hold a special term of court at a future day, it matters very little whether it adjourns to that day, as in the case in hand, or adjourns the term which it is holding *sine die,* and at the same moment appoints a special session for such future day. In either event, the same result is accomplished, and, if litigants in cases pending before it are given notice by the order of adjournment that the court will resume its sessions on a certain future day, it would seem that they are not prejudiced, and have no just ground to complain, although the court does not make a formal order calling a special session. If the power to appoint and hold a special session resides in the judge, it would seem that the manner and form of its exercise is not of much importance, unless a statute requires the power to be exercised in some particular manner. United States v. The Little Charles, 26 Fed. Cas. 982, 1 Brook. 380; Mattingly v. Darwin, 23 Ill. 567.[1]

SCHOFIELD v. HORSE SPRINGS CATTLE CO.

Circuit Court, D. Montana. 1895.

65 Fed. 433.

This was a suit by John W. Schofield, receiver of the Albuquerque National Bank of New Mexico, against the Horse Springs Cattle Company, W. B. Slaughter, and D. C. Kyle. A decree *pro confesso* was entered against all of the defendants on the 29th day of June, 1894. A motion was made August 6, 1894, to set aside this decree. The other important facts bearing upon the point involved in this reprint are found in the opinion.[2]

[1] The facts are restated, and only a portion of the opinion is reprinted.—Ed.

[2] The facts are restated in part and only a portion of the opinion is reprinted.—Ed.

KNOWLES, District Judge.—This case is further complicated from the fact that on the 3d day of July, 1894, this court adjourned to the 12th of said month. That on said last-named date, by a telegram in writing, the judge holding said court ordered said court adjourned until the 19th day of said month. On that day the said judge telephoned to the clerk of said court an order that said court be adjourned until the 6th day of August following. On the said 6th day of August the aforesaid motion was called to the attention of the court and argued. Owing to the doubt as to whether the court was legally in session, a few days subsequent it was adjourned. It is a matter of some importance in this case to know whether or not the court was in session on the 6th day of August. There are several decisions of the United States Supreme Court that hold that a Federal Court cannot set aside or vacate a judgment entered at one term at a subsequent term; that, as long as a term lasts, a court can modify or vacate a judgment or decree entered at that term, but as soon as the term ends the power of a court over its decrees entered during the continuance thereof terminates. Cameron v. McRoberts, 3 Wheat. 591; McMicken v. Perrin, 18 How. 507. If, however, a motion is made to vacate a judgment or decree at the same term at which it was rendered, and the motion is presented to the court, and submitted, and taken under advisement, the court at a subsequent term, in ruling upon this motion, may vacate and set aside a judgment or decree. Goddard v. Ordway, 101 U. S. 745. The telegram to the officers of the court directing an adjournment from the 12th to the 19th of July may be considered an order in writing. A telegram has been classed as a memorandum in writing, within the statute of frauds. Thomp. Electr., §§ 476, 477. But a conversation or order sent by telephone cannot be properly termed a "written" conversation or order. The statute requires that a written order should be directed alternatively to the marshal, and, in his absence, to the clerk, to adjourn the court. Rev. St. § 672. The court was not adjourned by the written order of court on the 19th day of July. Did the term lapse for this reason? This is a question not free from difficulty.

The case of Railway Co. v. Hand, 7 Kan. 380, is directly in point, to the effect that, under the condition of affairs presented in this case, the term would not lapse. In that case a verdict was received and judgment ordered on Saturday, the 5th of December. The court adjourned until Monday, the 7th. The judge was absent until the 9th, when court was called. On the 8th a motion for a

new trial was filed. It was held to have been filed during the term. In that case the court said:

"The term of court is fixed by law. Having once opened, it so continues till the term expires or an adjournment *sine die* is made."

In the case of Labadie v. Dean, 47 Tex. 90, the court said:

"The court convened and was duly organized at the time prescribed by law. When the court is organized and opened for a regular term, the term continues until it is ended by order of final adjournment, or until the efflux of the time fixed by law for its continuance. * * * The orders of adjournment of its sessions from day to day, or to a particular hour of the day, are mere announcements of its proposed or intended order of transacting the business to come before it during the term. But, certainly, the failure of the court to meet at the hour or on the day to which it had thus taken a recess can in no way affect or put an end to its term."

In the case of Barrett v. State, 1 Wis. 156, it was sought to set aside a verdict in a case because it was received during an adjournment of the court. The court adjourned at 6:30 o'clock p. m. to the next day at 8:30 a. m. Between these times the court received the verdict of a jury. It was held that the verdict was received in term time. In the discussion of the question, the court said: "But, for all general purposes, the court is considered as in session from the commencement till the close of the term." In this case it was shown that during the time when a court was adjourned, as it is called, the court had control over juries and their conduct; that grand juries could be in session, and witnesses could be examined and punished for contempt by the court for refusing to answer proper questions.

From these cases it would appear that these "adjournments," as they are called, of the court do not affect the term. This continues, when properly commenced, until a final adjournment, or perhaps, more properly, until the court declares it terminated, or it is terminated by some law. In some states the length of a term is prescribed by law. It would seem, under the act of Congress above referred to, it was thought it would be necessary to have the court adjourned from time to time, in order that the term might continue.[3]

[3] Compare Streett v. Reynolds, 63 Ark. 1, 38 S. W. 150 (1896); Loesnitz v. Seelinger, 127 Ind. 422, 427-428, 25 N. E. 1037, 1038 (1890).—Ed.

BALL v. UNITED STATES.

Supreme Court of the United States. 1891.

140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

On the 4th of December, 1888, the clerk of the District Court of the United States for the Eastern District of Texas, at Galveston, certified to the circuit judge for the fifth circuit that the district judge of that district was "prevented by reason of illness from continuing the holding of the present November term of the District and Circuit courts of the United States for the Eastern District of Texas, at Galveston; and also the coming terms of said courts at Tyler, Jefferson and Galveston, in the year 1889." Thereupon the circuit judge issued an order designating and appointing "the judge of the Western Judicial District of Louisiana to conclude the holding of the present November term of the District and Circuit courts for the Eastern District of Texas, at Galveston, and also to hold the coming terms of the District and Circuit courts in said Eastern District of Texas, during the year 1889, and during the disability of the judge of said district, and to have and exercise within said district during said period, and during such disability, the powers that are vested by law in the judge of said district." On the 12th of March, 1889, Congress created a new division of the Eastern Judicial District of Texas, the courts to be held at Paris, Texas, and with "exclusive original jurisdiction of offences" committed within a designated portion of Indian Territory attached to that district, and directed two terms to be held, one in April, and one in October. 25 Stat., p. 786, c. 333, § 18. Under the authority so given the judge of the Western District of Louisiana held the Circuit Court at Paris in October, 1889, during which term persons were tried and convicted of the offence of murder, committed in that part of the Indian Territory; and on the following April term they were sentenced to death. Before that term commenced, the regular district judge of that district died.[1]

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

We are of opinion that the irregularities alleged did not place Judge Boarman, in holding the October term, in any other posi-

[1] The facts are stated as found in the syllabus of the opinion printed in the official report, and only a portion of the opinion is reprinted.—Ed.

tion than that of a judge *de jure,* and that as to the April term, he was judge *de facto* if not *de jure,* and his acts as such are not open to collateral attack. Norton v. Shelby County, 118 U. S. 425; In re Manning, 139 U. S. 504; Clark v. Commonwealth, 29 Penn. St. 129; Fowler v. Beebe, 9 Mass. 231; Commonwealth v. Taber, 123 Mass. 253; State v. Carroll, 38 Connecticut, 449; Keith v. State, 49 Arkansas 439; People v. Bangs, 24 Illinois 184.[2]

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS v. BUTLER.

Circuit Court, D. Massachusetts. 1888.

33 Fed. 374.

COLT, J.—The claim that the judge who presided at the trial was not duly appointed for that purpose is based upon sections 591 and 596 of the Revised Statutes, which, so far as they relate to this question, are as follows:

"Sec. 591. Where any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, or of the circuit court in his district in the absence of the other judges and that fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said District Court, and a certified copy thereof, under the seal of the court, shall be transmitted by the district clerk to the judge so designated and appointed."

"Sec. 596. It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one, the district judge of any judicial

[2] For the definition of a de facto officer, see U. S. v. Alexander, 46 Fed. 728, 729-730 (1891). But see Norton v. Shelby County, 118 U. S. 425, 441, 6 S. Ct. 1121, 1125, 30 L. Ed. 178, 186 (1896).—Ed.

district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit. * * * ''

The facts are that in pursuance of section 596 the circuit judge designated and appointed Judge Carpenter to hold the term of the Circuit Court in aid of the district judge for this district by an instrument in writing, duly signed, which instrument was filed in the office of the clerk of the Circuit Court. The defendant claims that the instrument of appointment should have been filed in the office of the clerk of the District Court, and that the failure so to file it makes the appointment invalid and of no effect, so that the judge had no authority to preside in the Circuit Court. * * *

The provision is directory only. The language is that the ''appointment'' shall be filed, and this language alone, if there were no other considerations on either side, might be held sufficient to imply that the appointment is complete before it is filed. But the substantial ground of my conclusion is that the filing of the paper is not of the essence of the act to be done, but relates solely to the manner of procedure. The essence of the act is the determination and decision on the part of the circuit judge—First, that the public interest requires that a judge be designated; and, secondly, that a particular judge is selected for that purpose. The act of putting this on paper and signing it, if signature be necessary, is perhaps the last and essential element of that determination. The filing of the notice seems to have no office except to notify the clerk and the judge that the determination has been made.

Against this view of the scope and intent of the statute nothing can be found in the words of the statute itself. There is no prohibition against procedure otherwise than is directed. The provision that the circuit judge may ''designate and appoint'' is complete in itself, and the provision as to filing the appointment is afterwards added in separate sentences. There is nothing in the words or in their collocation which obstructs the separation of those provisions which appear to me non-essential and directory from which are essential and mandatory. If it were held that the filing in the clerk's office is essential it would seem that there would be no escape from the conclusion that the sending of a copy to the designated judge is also essential. Such a conclusion would, as it seems to me, be absurd. For example, there might be a case in which the circuit judge had made his determination and appointment, had reduced his appointment to writing, and delivered

it to the judge therein appointed, and that judge had himself delivered the paper to the clerk of the District Court, and the clerk had filed and entered the same, and yet the authority of the judge would be incomplete because the clerk had not handed him in return a certified copy of the paper of appointment. This copy, it is observed, could serve no purpose except to notify him of that which he already knew, since there is no provision that he shall preserve it by way of evidence of the facts. I cannot think it safe to follow an argument which leads to such conclusions.

The motion in arrest of judgment is overruled.[1]

NOTE.—Under section eighteen (18) of the Judicial Code of the United States the senior circuit judge was allowed to appoint himself. Pennsylvania Steel Co. v. New York City Ry. Co., 221 Fed. Rep. 440, 442-443 (1915).

COLTRANE v. TEMPLETON.

Circuit Court of Appeals, Fourth Circuit. 1901.

106 Fed. 370, 45 C. C. A. 328.

SIMONTON, Circuit Judge.—The sixth assignment of error goes to the disqualification of the judge because of the pendency in the State court of a suit by him against the defendant corporation, and because one of the parties in the Templeton petition[2] was his son-in-law. There can be no doubt that no one should sit in a cause in which he, or those with whom he is connected, have an interest. It is unnecessary to cite authority for this, as it is a principle embedded in our jurisprudence. In the present case the learned judge who was presiding felt the full force of this doctrine, and gave it weight. He is said to be disqualified because of the suit pending in the State court against the corporation, brought by him as plaintiff. Did this disqualify him from making administrative orders in the case? He recognized the narrow line of demarkation between these formal and preliminary orders

1 Only a portion of the opinion is reprinted.—Ed.

2 Templeton filed a petition as creditor against the defendant corporation which had become insolvent and for which a receiver had been appointed.—Ed.

that do not affect the decision of any question going to the merits of the controversy, and those in the decision of which he had a personal interest. Section 601, Rev. St., dealing with the disqualification of a judge sitting in the District Court, requires the removal of a cause when the circumstances "render it improper in his opinion for him to sit on the trial." So he naturally felt that it was for him to decide. The bill was filed in his court under his order; the receiver was recognized and appointed by him,—both on the motion of the counsel now objecting. The petition in question was before him three several days, the same counsel appearing, and on the last day was fully argued. He took the case under advisement until the next day. When he was about to announce his opinion, for the first time the objection was made that he was disqualified. He could well believe that the counsel themselves had seen that it was at least doubtful; that it was a point on which persons could differ. Indeed, he could well believe that the objection, if it had force, had been waived. In Moses v. Julian, 45 N. H. 52, quoted by appellee, it is said:

"If the facts are known to the party recusing, he is bound to make his objection before issue joined and before the trial is commenced; otherwise, he will be deemed to have waived the objection, in cases when a statute does not make the proceedings void. After a trial has commenced, no attempt to recuse a judge will be listened to unless it is shown affirmatively that the party was not aware of the objection, and was in no fault in not knowing it."

To the same effect are Crosby v. Blanchard, 7 Allen 385, and Railroad Co. v. Taylor, 93 Va. 226, 24 S. E. 1013.

Under these circumstances, the judge had taken the matter into consideration, and, having reached his own conclusion, adhered to it. If we are governed by the analogy of section 601, Rev. St., it is a matter within his discretion and not the subject of error. Cheang Kee v. U. S., 3 Wall. 320, 18 L. Ed. 72; Earnshaw v. U. S., 146 U. S. 60, 13 Sup. Ct. 14, 36 L. Ed. 887. Freem. Judgm., § 145, declares the law which seems to control this question:

"While it is well settled by the common law that no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors, yet his action in such a case is regarded as an error or irregularity not affecting his jurisdiction, and to be corrected by a vacation or reversal of his judgment, except in the case of those inferior tribunals from which no appeal or writ of error lies. If the facts are known to the party recusing, he is bound to make his objection before issue joined, and

before the trial is commenced; otherwise, he will be deemed to have waived the objection, in cases where a statute does not make the proceedings void."[2]

EPSTEIN v. UNITED STATES.

Circuit Court of Appeals, Seventh Circuit. 1912.

196 Fed. 354, 116 C. C. A. 174.

BAKER, Circuit Judge.—Plaintiff in error was convicted of suborning a witness at a hearing in a bankruptcy proceeding to commit perjury.

A most flagrant case on the part of a member of the bar in corrupting a witness was completely presented in the indictment, amply sustained by the evidence, and fully and fairly submitted to the jury by the charge of the judge. Assignments of error with respect to indictment, variance, and charge need no specific attention. Two questions remain that require statement and answer.

(1) I. Section 601 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 484) provides that if "the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, * * * it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court," and to certify the case to another court.

Plaintiff in error filed an affidavit in which he alleged that the

2 Only a portion of the opinion is reprinted.

In the following cases it was held that there had been a waiver of the right to object that the judge was disqualified: Pace v. Reed, 138 Ky. 605, 614-615, 128 S. W. 891, 894 (1910) demurrer to petition passed upon without objection; DuQuoin Waterworks Co. v. Parks, 207 Ill. 46, 49, 69 N. E. 587, 588 (1903) went to trial after obtaining change of venue, making no objection; Buena Vista Loan & Savings Bank v. Grier, 114 Ga. 398, 399, 40 S. E. 284, 284 (1901) consented in term to order empowering presiding judge to try case in vacation.

But see First Nat. Bank v. McGuire, 12 S. D. 226, 233-234, 80 N. W. 1074, 1076, 47 L. R. A. 413, 415-416, 76 Am. St. Rep. 598, 602-603 (1899); Chase v. Weston, 75 Ga. 159, 39 N. W. 246 (1888); January v. State, 36 Tex. Cr. R. 488, 491, 38 S. W. 179, 179 (1896).

Compare Stone v. Marion County, 78 Ia. 14, 15-17, 42 N. W. 570, 571 (1889); Ingraham v. State, 82 Neb. 553, 556-557, 118 N. W. 320, 321 (1908). —Ed.

judge was conducting a hearing in a bankruptcy case for the purpose of discovering assets; that at the conclusion of the hearing the judge appeared to be angry and said in the presence and hearing of affiant, "This is a nasty piece of business; this estate has been looted by someone;" that the judge then turned to a gentleman standing at the bar and said, "Use what is left of this estate, even to the last penny, to investigate this matter, and if any one, whoever he may be, has committed any act that can be reached and punished under the law, institute proceedings against him."

On this it is asserted that the judge was "concerned in interest" in the case, and became "of counsel" for the prosecution. Official duties of the trial judge include his instructions to grand juries to investigate alleged violations of law, which may be brought to their attention by the district attorney or otherwise, and of whose actual existence the judge personally knows nothing. If in the course of official business in court the judge sees that an offense against the Penal Code has been or is being committed, does his official duty require him to ignore the matter? No, we say. For him to fail to direct an investigation to be made would be not merely an abandonment of his post as a minister of the law, but as well an implied approval or condonation of the offense. To direct a prosecuting officer (and presumably the "gentleman standing at the bar" was an officer who pursued the inquiry which resulted in the indictment) to inquire into a matter occurring in court, certainly no more than charging a grand jury, makes the judge concerned in interest" or "of counsel" for the prosecution within the meaning of section 601. The Richmond (C. C.) 9 Fed. 863.[1]

[1] In the following cases it was held that the judge had not been of counsel: Lee v. Heuman, 10 Tex. Civ. App. 666, 667, 32 S. W. 93, 93-94 (1895), mere casual expressions of opinion as to merits of case, not being engaged in case; Ft. Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410, 420-421, 18 S. W. 949, 953 (1892), name of judge appearing by mistake on one of papers as counsel.

As to disqualification on the ground of relationship, see Bryant v. Livermore, 20 Minn. 313, 344 (1874); Fowler v. Byers, 16 Ark. 196, 197 (1855).

As to when a judge is a material witness, see Marry v. James, 2 Daly (N. Y.) 437 (1869).

As to the nature of the interest in an action which a judge must have in it to disqualify him from sitting as judge, see Ex parte Harris, 26 Fla. 77, 82-83, 7 So. 1, 2, 23 Am. St. Rep. 548, 549-550, 6 L. R. A. 713, 713-714 (1890); Ferguson v. Brown, 75 Miss. 214, 227, 21 So. 603, 606 (1897).

As to the effect upon proceedings of acts of a judge who is disqualified on the ground of interest, see Findley v. Smith, 42 W. Va. 299, 305, 26 S. E. 370, 372 (1896); State v. Young, 31 Fla. 594, 601, 12 So. 673, 675, 34 Am. St. Rep. 41, 44-45 (1893).

DUNCAN v. ATLANTIC COAST LINE R. CO.

District Court, S. D. Georgia. 1915.

223 Fed. 446.

LAMDIN, District Judge. The question here presented is whether the presiding judge is disqualified from hearing the above-stated case on account of the fact that before his appointment as district judge the law firm of which he was then a member was local counsel for defendant railroad company in Ware county, Ga.; the employment of said firm being restricted to the counties of Ware and Charlton. He had no connection with the case at bar, which was originally brought in the City Court of Savannah and removed to this court, and knew nothing of said case until he reached it on the docket.

(1) At common law there existed no ground for the disqualification of a judge. Blackstone in his Commentaries stated that the law of England in his time was as follows:

"By the laws of England also, in the times of Bracton and Fleta, a judge might be refused, but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." 3 Bl. Com. 361; Co. Litt. 294; 23 Cyc. 575.

It is by statute that a judge is declared to be disqualified in particular instances, and, as a general rule, the statutory grounds

In the following cases it was held that the judge had an interest in the action: Thornton, Adm'r v. Moore, 61 Ala. 347, 354 (1878), creditor of estate being probated; Gay v. Minot, 57 Mass. (3 Cush.) 352 (1849), debtor of estate being probated; Ex parte Cornwell, 144 Ala. 497, 39 So. 354 (1905), depositor in bank one of whose officers was being prosecuted for embezzlement of the bank's money; Collingsforth County v. Myers, 35 S. W. 414, 415 (1896), interested to extent of costs; Templeton v. Giddings, 12 S. W. 851 (1889), member of firm holding note as security.

In the following cases it was held that the judge did not have an interest in the action. Bowman's Case, 67 Mo. 146, 150-151 (1877), honorary member of bar association, the disbarment of one of whose members was in issue; Clark v. State, 23 Tex. App. 260, 262, 5 S. W. 115, 116 (1887), title to property involved was held by judge in his official capacity; Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 36-37, 53 Pac. 440, 441 (1898), judge formerly owned stock in plaintiff company, but did not when action was brought; City of Oakland v. Oakland Water-Front Co., 118 Cal. 249, 50 Pac. 268 (1897), judge was resident and taxpayer of a city suing for a valuable piece of land.—Ed.

of disqualification are exclusive. Elliott v. Hipp, 134 Ga. 844, 848, 68 S. E. 736, 137 Am. St. Rep. 272, 20 Ann. Cas. 423; Luke v. Batts, 11 Ga. App. 783 (3), 76 S. E. 165; 17 Am. & Eng. Enc. Law, pp. 738, 740. In order to decide the question under consideration, it is therefore necessary to consider the statute of the United States governing such matters. This is to be found in section 20 of the Judicial Code of the United States which is as follows:

"Whenever it appears that the judge of any District Court is any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order than an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit, and thereupon such proceedings shall be had as are provided in section fourteen."

The presiding judge in this case is not "concerned in interest" in the pending suit, nor is he "a material witness" therein, nor is he "related to or connected with either party" at the present time, so as to render it improper for him to sit at the trial of the case.

But this section also prohibits a judge from presiding who "has been of counsel." The question involved here, therefore, is whether the expression last quoted means that a judge is disqualified who "has been of counsel" at any time for a party to the cause, or whether he is disqualified only when he "has been of counsel" in the case to be tried. The use of the expression in question in connection with the context shows conclusively that the words "has been of counsel" are restricted to the suit under consideration. The language of the section is that;

"Whenever it appears that the judge of any District Court is any way concerned in interest in any suit pending therein or has been of counsel, or is a material witness for either party," etc.

It is evident that the words "in any suit pending therein" are to be understood, at the end of the above excerpt from the section. As stated by the district judge in the case of the Richmond (C. C.) 9 Fed. 863.

"The decisions, so far as I have been able to find, are unanimous

that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist."

In the absence of statute, judges are not disqualified, even by reason of having been counsel in a cause. 23 Cyc. 586; Lloyd v. Smith, T. U. P. Charlt. (Ga.) 143.

The Code of Georgia of 1910, § 4642, which covers substantially the same grounds of disqualification as the federal statute, clears up the question, by stating specifically that the judge must have been of counsel in the pending case to be disqualified; the language of the section being as follows:

"No judge or justice of any court * * * can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor in which he has been of counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the consent of all the parties in interest: Provided, that in all cases in which the presiding judge of the Superior Court may have been employed as counsel before his appointment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless the judge declines to do so."

The Supreme Court of Georgia has decided the question here presented squarely in the following language:

"The fact that a judge of the Superior Court had formerly been a director of a railroad company, and was so at the time that an attorney rendered professional services to the company, did not disqualify him from presiding at the trial of a suit for such services, if at that time he had ceased to be a director, owned no stock, and was not otherwise interested. It is present, not past, interest which disqualifies a judge." Johnson, Executrix, v. Marietta & North Georgia Railroad, 70 Ga. 712 (1).

The Supreme Court of the United States in the case of Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508, also held as follows:

"The fact that a circuit judge, prior to his appointment, had been counsel for one of the parties in matters not connected with the case on trial, does not disqualify him from trying the cause."

See, also, the case of Conyers v. Ford, Receiver, 111 Ga. 754, 36 S. E. 974; In re Nevitt, 117 Fed. 448, 451, 54 C. C. A. 622; 23 Cyc. 585; The Richmond (C. C.) 9 Fed. 863; and Ex parte N. K. Fairbank (D. C.), 194 Fed. 978, 987.

(2) The presiding judge in this case does not come within the letter or the spirit of the prohibition of the statute. He is not connected with either party; he has never heard of the case before, and knows nothing about the facts or issues involved; and he feels that his mind is absolutely impartial between the parties to the cause, and that it is therefore neither illegal nor improper for him to preside at the trial of the case. He holds, therefore, that he is not disqualified.[1]

EX PARTE N. K. FAIRBANK CO.

District Court, M. D. Alabama. 1912.

194 Fed. 978.

JONES, District Judge. On the 12th of February, 1912, Mr. J. F. Merryman, who describes himself in the papers as "the attorney of the N. K. Fairbank Company" and "a resident member of the bar of the city of St. Louis of the State of Missouri," mailed from that city to the clerk of the court here an application and affidavits, praying that the presiding judge proceed no further in the case of the Jackson Lumber Company v. N. K. Fairbank Company, and certify the matter to the senior circuit judge of this circuit pursuant to the provisions of the Judicial Code. The papers, as the correspondence between Mr. Merryman and the clerk shows, were not presented to the presiding judge until February 20, 1912, on account of a death in his family, but were marked "Filed" by the clerk on the 14th of February, 1912, the date of their receipt; the judge having no knowledge or information of their existence until their presentation to him on February 20, 1912.

Messrs. Ball & Samford, the counsel of record of the Fairbank Company in this court, each advise the judge that they had and are taking no part in this application, and so far as they are concerned they are willing to try the case before the presiding judge.

(1) The matter thus presented has been duly considered, and

[1] Compare Tampa St. Ry. & Power Co. v. Tampa Suburban R. Co., 30 Fla. 595, 11 So. 562 (1892); Terry v. State, 24 S. W. 510 (1893); State v. Hocker, 34 Fla. 25, 29-32, 15 So. 581, 583 (1894).

See also McIndoo v. State, 66 Tex. Cr. App. 307, 308, 147 S. W. 235, 236 (1912); Wilks v. State, 27 Tex. App. 381, 11 S. W. 415 (1889); Cleghorn v. Cleghorn, 66 Cal. 309, 5 Pac. 516 (1885).—Ed.

I now give my conclusions, reserving for another time the filing of a more extended opinion. Assuming without deciding the constitutionality of the statute, the application and affidavits are fatally defective, whether construed separately or in connection with the application to which they refer, because they do not charge as a matter of fact that the judge "has a personal bias or prejudice against the defendant or in favor of the plaintiff" They affirm in legal effect only that affiants are "informed and believe" such is the fact. Pollard, Assignee, et al. v. Southern Fertilizer Company, 122 Ala. 410, 25 South 169; Schilcer v. Brock & Spight, 124 Ala. 626, 27 South. 473.

(2) Second. They are not accompanied by any statement, as the Judicial Code explicitly requires, "of the facts and the reasons for the belief," save in one immaterial instance, the correspondence, which on its face, both as matter of law and morals, disproves the existence of either bias or prejudice between the parties.

(3) Third. The certificate of good faith is not made by any "counsel of record" of this court. The gentleman who makes the certificate has never been admitted as an attorney of this court. He has never signed the roll of its attorneys, or taken the oath as required by its rules, and has never been recognized by the court as a counsellor thereof in any proceeding had in this or any other cause in this court. Ex parte Secombe, 19 How. 9, 15 L. Ed. 565.

(4) Fourth. If the Judicial Code applies to a case pending at the time it went into effect, which it does not (Henry v. Harris et al. (C. C.) 191 Fed. 858), the petitioner has failed to bring itself within its provisions, because it did not present the application within 10 days after the Code went into effect on January 1, 1912 but delayed attempting to file the affidavits until February 12, 1912, during which period the court was always open in the term at which the case stood for trial, and the affidavits and application offer no excuse for the failure to act within the time prescribed by the statute. State v. Donlan, 32 Mont. 256, 80 Pac. 244.

(5) Fifth. The correspondence between the presiding judge and Judge Shelby, made an exhibit to the petition, shows on its face as a matter of law that the presiding judge has no prejudice against the defendant or bias for the plaintiff. It does not even show prejudice against the petitioner's attorney who wrote the application which called forth the letter to Judge Shelby. Conn. v. Chadwick, 17 Fla. 429; City of Emporia v. Volmer, 12 Kan. 627; State v. Ingalls, 17 Iowa 8; People v. Williams, 24 Cal. 31; State v. Bohan, 19 Kan. 54; Turner v. Commonwealth, 2 Mete.

(Ky.) 629; People v. Findley, 132 Cal. 304, 64 Pac. 472; Higgins v. San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; Smith v. Commonwealth, 108 Ky. 56, 55 S. W. 718.

The applications and affidavits make no case under the statute and disclose nothing which could excuse, much less justify, the presiding judge in abdicating his duty under the Constitution and laws. The affidavits and application were marked "Filed" by the clerk without the knowledge or order of the presiding judge. Not conforming to the statute, but being defective in the particulars stated, they were not entitled to be filed under the plain terms of the Judicial Code, and could be only presented to the judge. Wolf v. Marmet, 72 Ohio St. 578, 583, 74 N. E. 1076.

It is exceedingly desirable that the action of the presiding judge in this matter be reviewed. He will give any co-operation in his power to a speedy decision, if the petitioner will advise him that it desires to take steps to that end, and if so advised, will not try the case on the day set on the docket, but will postpone the hearing to some other day.

It is considered that the endorsement of filing upon said papers by the clerk on February 14, 1912, be, and the same is hereby, expunged; and that the prayer of the N. K. Fairbank Company that the presiding judge recuse himself and certify the matter to the senior circuit judge of this circuit be, and they are, each severally and separately overruled and denied, at the cost of the petitioner.[1]

UNITED STATES v. MURPHY.

District Court, D. Delaware. 1897.

82 Fed. 893.

BRADFORD, District Judge.—The general purpose of section 602 [2] is plain. It is that the administration of justice by a District

[1] The facts are omitted. A valuable extended discussion of the points outlined in the reprinted portion of this case is found in an additional opinion on pages 986-1001 of 194 Fed.

Compare State v. Wolfe, 11 Ohio Cir. Ct. R. 591, 599 (1895); Lincoln v. Territory, 8 Okl. 546, 58 Pac. 730 (1899); Munce v. State, 187 Ind. 263, 118 N. E. 953, 953 (1918); State v. Palmer, 4 S. D. 543, 57 N. W. 490 (1894).

In the following cases it was held that there was such prejudice on the part of the judge as to disqualify him from sitting: Morehouse v. Morehouse, 136 Cal. 332, 335, 68 Pac. 976 (1902); Givens v. Lord Crawshaw, 21 Ky. Law Rep. 1618, 1622-1623, 55 S. W. 905, 907 (1900): Powers v. Commonwealth, 114 Ky. 237, 245-260, 70 S. W. 644, 646-651 (1902).—Ed.

[2] Section 602 is similar to section 22 of the Judicial Code.—Ed.

Court shall not, through a vacancy in the office of judge, be defeated or unduly impeded; that causes, civil and criminal, shall, notwithstanding the vacancy, be preserved in their full force and vitality, to be effectively proceeded in when there is a judge authorized to discharge the functions of the court; that all acts and steps, calling for or serving as the basis of judicial action, which otherwise must or should earlier be done or taken in court in the progress of a cause, shall or may be done or taken therein after the termination of the vacancy. It cannot reasonably be supposed that Congress, in enacting section 602, in fact intended that it should not apply to a recognizance in a criminal cause. It is not to be assumed that it was the purpose of the lawmaking body to sacrifice substance and retain the shadow; to throw away the kernel and preserve the shell; to continue the writs, pleadings, and other proceedings in a criminal prosecution until after the termination of the vacancy, and at the same time to render them ineffectual by permitting the escape of the accused through the expiration, during the vacancy, of the recognizance, the giving of which was exacted as the condition of his discharge from custody. Such an intention would be irreconcilable with the spirit and broad purpose of the statute. The question, then, is whether the terms and provisions of the section, properly interpreted and construed, are comprehensive enough to include a recognizance for appearance and answer in a criminal cause. As the term "pleadings" is inapplicable, if the recognizance be within the section it must come under "process" or "proceedings." The legal meaning of the word "process" varies according to the context, subject-matter, and spirit of the statute in which it occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court, under the seal thereof. In this sense it is used in sections 911 and 912 of the Revised Statutes, in the former of which it is provided that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;" and, in the latter, that "all process issued from the courts of the United States shall bear teste from the day of such issue." In its largest sense, process is equivalent to procedure, including all the steps and proceedings in a cause from its commencement to its conclusion. In Wayman v. Southard, 10 Wheat. 1, 27, Chief Justice Marshall, in delivering the opinion of the court, spoke of the words "modes of process," as contained in section 2 of the act of Congress of September 29, 1789, as follows:

"To 'the forms of writs and executions' the law adds the words 'modes of process.' These words must have been intended to comprehend something more than 'the forms of writs and executions.' We have not a right to consider them as mere tautology. They have a meaning and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding."

Section 587 of the Revised Statutes provides that the Circuit Court "shall proceed to hear and determine the suits and processes" certified into it from the District Court, and refers to "all suits and processes, civil and criminal, depending in said District Court, and undetermined." Again in section 588 provision is made for the hearing and determination by the Circuit Court of the "suits, pleas and processes, civil and criminal," "begun" in the District Court. The term "process" is used in section 602 in neither its narrowest nor its broadest sense. While not including the whole cause, there can be little or no doubt that it was intended to embrace, among other things, all the means provided by law for compelling one, arrested and held on a criminal charge, to appear in court, there to be judicially dealt with. The section does not in terms restrict "process" to process of the court, and in the absence of such restriction it cannot be so limited by construction. Otherwise, a distinction without any reason to support it would exist between imprisonment under a bench warrant and imprisonment under a commitment by a commissioner. It is true that the word "pending" occurs in the section. In so far as it may apply to process, it is not to be taken in the strict sense, contended for in argument, of pending in court. Such a construction would largely defeat the manifest purpose of the section. A reasonable meaning can be assigned to the term without doing violence to the rules of construction, which will be in harmony with the general scope of the enactment. In People v. Lacombe, 99 N. Y. 43, 1 N. E. 599, the court used the following language, peculiarly applicable to the construction of the section under consideration.

"A strict and literal interpretation is not always to be adhered to; and, where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit

and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute."

"Process pending before" the court must be held to include process, in the sense last above mentioned, of which the object has not been fully accomplished,—process which is still in fieri,—process, which, if continued in force, will result either in securing the appearance of the accused to meet the demands of justice or in fastening upon the recognizors liability for his default.[1]

DISTRICT COURTS.

SECTION II.

JURISDICTION.

UPSHUR COUNTY v. RICH.

Supreme Court of the United States. 1890.

135 U. S. 467, 10 S. Ct. 651, 34 L. Ed. 196.

MR. JUSTICE BRADLEY delivered the opinion of the court.[2]

The question what is a "suit" in the sense of the judiciary laws of the United States has been frequently considered by this court. Reference may be made particularly to the following cases: Weston v. City of Charleston, 2 Pet. 449, 464; Kendall v. United States, 12 Pet. 524; Holmes v. Jennison, 14 Pet. 540, 566; Ex parte Milligan, 4 Wall. 2, 112; Kohl v. United States, 91 U. S. 367, 375; Gaines v. Fuentes, 92 U. S. 10, 21, 22; Boom Company v. Patterson, 98 U. S. 403, 406; Ellis v. Davis, 109 U. S. 485, 497; Hess v. Reynolds, 113 U. S. 73, 78; Pacific Railroad Removal Cases, 115 U. S. 1, 18; Searl v. School District, 124 U. S. 197, 199; Delaware County v. Diebold Safe Co., 133 U. S. 473, 486, 487.

In the four cases first cited this court determined that writs of prohibition, mandamus and habeas corpus, prosecuted for the

[1] Only a portion of the opinion is reprinted.—Ed.

[2] Only a portion of the opinion is reprinted.—Ed.

attainment of the parties' rights, are suits within the meaning of the law, the judgments upon which, in proper cases may be removed into this court by writ of error. In Weston v. City of Charleston Chief Justice Marshall said: "Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." This definition is quoted with approbation by Chief Justice Taney in Holmes v. Jennison, which was a case of habeas corpus, and by other judges in subsequent cases.

Boom Company v. Patterson, Pacific Railroad Removal Cases, and Searl v. School District were cases of the assessment of the value of lands condemned for public use under the power of eminent domain. The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of Congress. In Boom Company v. Patterson the company was authorized by the state laws of Minnesota to take land for the purpose of its business, and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the District Court, where it was to be entered by the clerk "as a case upon the docket," the land owner being designated as plaintiff and the company as defendant. The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and determined. Issues of fact were to be tried by a jury, unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company, subject to review by the Supreme Court of the state on writ of error. This mode of proceeding was followed. The Boom Company and the land owner both appealed from the award of the commissioners. When the case was brought before the District Court, the owner, being a citizen of another State, applied for and obtained its removal to the Circuit Court of the United States, where it was tried before a jury and a judgment was rendered upon their award. We

held that the appeal in that case was a suit within the meaning of the act of Congress authorizing the removal of causes from the State to the Federal courts. Mr. Justice FIELD, speaking for the court, said: "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents.

In Delaware County v. Diebold Safe Co. it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the Circuit Court of the county, is a suit removable to the Circuit Court of the United States.

In Kohl v. United States, the whole proceeding for condemnation of land as a site for a post-office was held to be a suit. Mr. Justice STRONG, delivering the opinion of the court, said: "It is difficult to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court." This view of the proceeding as a whole, instituted and concluded in a court, and analogous to the proceeding of *ad quod damnum* at common law, perhaps, distinguished this case from the other cases before referred to.

Two of the other cases cited, Gaines v. Fuentes and Ellis v. Davis, arose out of proceedings to set aside the probate of wills; and although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit. As observed by Mr. Justice MATTHEWS, speaking for the court in Ellis v. Davis, "Jurisdiction as to wills and their probate as such, is neither included in, nor excepted out of, the grant of judicial power to the courts of the United States. So far as it is ex parte and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in

equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.'' Similar views were expressed by Mr. Justice MILLER in Hess v. Reynolds, which was the case of a creditor instituting proceedings in a Probate Court against the estate of his deceased debtor, and then removing them into the Circuit Court of the United States.

The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit, but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.[3]

UNITED STATES v. BLOCK.

Circuit Court, N. D. Illinois. 1872.

24 Fed. Cas. No. 14,610, p. 1176, 3 Bissell, 208.

This was a petition filed by the district attorney, in the name of the United States, for the condemnation of block 121, school section addition to Chicago, commonly called the ''Bigelow Block.'' The various parties claiming an interest in the land or any part of it, whether as owners of the fee, tenants, or by mortgages, judgments, liens, or otherwise, were made parties defendant, and commissioners appointed by the court, in conformity with the State statutes, who heard the evidence as to the value of the property, the damages to be assessed, and the rights and interests of the respective parties. On the coming in of this report some of the

[3] For a comparatively comprehensive list of instances where the courts have held there was, or was not, a ''suit,'' see 37 Cyc. 523-524.

For cases comparing the meaning of ''action,'' ''cause of action,'' ''case,'' and ''suit,'' see 37 Cyc. 525.—Ed.

parties in interest moved to dismiss the proceedings on the ground that the court had no jurisdiction. These proceedings were instituted for the purpose of obtaining ground for the erection of a custom-house and Government buildings in Chicago, in pursuance of the act of the Legislature of Illinois of December 14th, 1871, and the act of Congress of December 21st, 1871. * * *

DRUMMOND, Circuit Judge.—It may be conceded that there must be an act of Congress which has given the court jurisdiction either by express words or by necessary implication. The second section of the third article of the Constitution states that the judicial power shall extend, among other cases, "to controversies to which the United States shall be a party." This is undoubtedly a controversy to which the United States is a party. Under this grant of power Congress legislated at a very early day, and by the act of September 24th, 1789, commonly called the judiciary act, declared that the Circuit Court should have cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of $500, and the United States are plaintiffs or petitioners. This grant was undoubtedly prospective. At that time there was very little jurisdiction given by express enactment to the courts of the United States, and in fact this act created the courts of the United States, and by virtue of it the courts have, up to this time, cognizance of many cases.

So that this act was intended, whenever it occurred that a suit at law or in equity could be commenced, and the matter in dispute, exclusive of costs, amounted to the sum of $500, to allow the United States, as plaintiffs or petitioners, to bring it in the Circuit Court of the United States. Therefore, irrespective of the act of March 3, 1815, the effect of which is not necessary for us to here consider, the only question is, whether this is, within the meaning of this statute, a suit of a civil nature at common law or in equity, and of the value of $500, and the United States are plaintiffs or petitioners. The value, of course, is greater than the amount indicated. The United States are petitioners, and thus two of the conditions of the statute are complied with. The only remaining condition is, is it a suit of a civil nature at common law or in equity? It is contended that the act does not comprehend any other suit of a civil nature at common law or in equity, except such suits as were known at the time of its passage. If that is the true construction of the statute, then there might be some doubt

whether the court would have jurisdiction. But that has not been the construction which has been given to the statute. For it must be now considered as the settled doctrine of the Supreme Court of the United States, that whenever any statute is passed which authorizes the commencement of a civil suit, and under which a suit can be maintained, that then, although it may not have been known in precisely that form to the common law, this statute vests in the Circuit Court jurisdiction of the case, and it comes within the meaning of the law, being a suit of a civil nature at common law or in equity. Take the case of an action brought on a bond; it may be that the action is of such a character that at common law it could not be maintained; but if the statute authorizes the maintenance of the action, then the act of 1789 vests in the court jurisdiction of the case, without any express words; and so liberal has been the construction given to this statute, in cases of even criminal procedure, where, by that act, the Circuit courts have concurrent jurisdiction with the District courts; and by subsequent legislation—as by the act of February 13, 1862 (12 Stat. 339), the District Court, by the language of the statute, was alone clothed with jurisdiction of such cases; that the Supreme Court of the United States held that they could go back to the act of 1789, and sustain jurisdiction by virtue of that law in the Circuit courts. U. S. v. Holliday, 3 Wall. (70 U. S.) 407.

A question in principle similar to the one arising in this case was discussed in a case cited at the argument,—Ex parte Biddle (Case No. 1,391). That was a proceeding by partition confessedly existing only by virtue of the laws of Massachusetts, and the court uses this language: "Parties entitled to sue in the courts of the United States are, in general, entitled to pursue in such courts all the remedies for the vindication of their rights which the local laws of the State authorize to be pursued in its own courts."

This has been sanctioned by the Supreme Court of the United States (Parsons v. Bedford, 3 Pet. (28 U. S.) 433); and we cite it for the purpose of showing what is the meaning of the words used in the act of 1789, "suits at common law." The court is commenting on an amendment to the Constitution proposed by Congress at its first session, where those words are used: "When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article 'law', not merely

suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradiction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit," etc.

Now, it would follow, if this reasoning is correct, that the language in the 11th section of the act of 1789, "all suits of a civil nature at common law or in equity," is used in contradistinction to suits in admiralty, the exclusive jurisdiction of which was vested by the same act in the District Court, and also to criminal cases, jurisdiction of which was conferred by other sections. So that if this be true, and by a suit of a civil nature at common law or in equity is meant not the old and settled proceedings as recognized at common law or in equity, but suits in which legal rights are to be ascertained and determined, in contradistinction to cases in admiralty or criminal law, then this application is within the meaning of the 11th section of the act of 1789. It is a controversy to which the United States is a party and petitioner, and it is immaterial for the purposes of jurisdiction whether the forms of proceeding are those in ancient use, for they may be changed by statute or moulded as a court of chancery will always mould the forms of proceedings to suit the exigencies of the case.[1]

LORMAN v. CLARKE.

Circuit Court, D. Michigan. 1841.

15 Fed. Cas. No. 8516, p. 915, 2 McLean, 568.

Opinion of the Court.—The 11th section of the act of 1789 (1 Stat. 78) gives to the Circuit courts jurisdiction of all suits of a civil nature, at common law or equity, where the sum exceeds

[1] Only a portion of the facts and opinion is reprinted.

A Massachusetts statute allowed the administrator or executor of one killed by the negligent act of a railroad or street railway corporation, or by the unfitness, gross negligence, or carelessness of servants to recover not less than $500 or more than $5,000 as a fine. The recovery was to be based upon an indictment. An action, brought in reliance upon that statute, was held not to be a suit of a civil nature, but in effect an action to recover a penalty. It, therefore, could not be maintained in the federal court. Lyman v. Boston and A. R. Co, 70 Fed. 409 (1895).—Ed.

five hundred dollars. In some of the States there is no court of chancery, but this does not affect the exercise of a chancery jurisdiction by the Federal Court in such States. This jurisdiction extends alike to all the States. And it gives relief, where plain and adequate redress cannot be had at law, agreeably to the well established rule in the English Chancery. If a State were to authorize a chancery jurisdiction by her own courts, in all controversies concurrently with a court at law, this would not enlarge the jurisdiction of the Federal Court of Chancery. It could only interpose its remedial powers where the remedy was inadequate at law. The rules of practice of the high court of chancery, in England, have been adopted by the Supreme Court, and are obligatory upon the Circuit courts. They have power, however, to adopt other rules not inconsistent with the general rules.

It is argued that, in the exercise of the powers thus given and defined, we must look to the settled principles of an equitable jurisdiction in England; and that no relief can here be given which could not be given in that country. And that what a Federal Court of Chancery may do in one State it may do in another. That its jurisdiction not being derived from the laws of a State, its powers are in no respect influenced by such laws. That if a different rule were to prevail the court would lose the national character which was intended to be given to it, by its organization under the laws of the Union. The judiciary of the United States constitutes a co-ordinate and independent branch of the Government, and its powers are co-extensive with the laws. It was designed, undoubtedly, to secure a uniform construction and enforcement of the laws of the Union. And in this respect, in all the States, the rule of decision is unvaried. But the Federal Court has jurisdiction between citizens of different States, as well as in cases arising under the laws of the United States. And where controversies are brought before it, which do not arise under the laws of the Union, by what law are they to be determined. The law of the contract is the law of the place where it was made and was to be executed. There is no unwritten or common law of the Union. This rule of action is found in the different States, as it may have been adopted and modified by legislation, and a course of judicial decisions. The rule of decision, then, must be found in the local law written or unwritten. No foreign principle attaches to the Federal Court when exercising its powers within a State. It gives effect to the local law, under which the contract was made, or by virtue of which the right is asserted. And this independ-

ently of any act of Congress adopting the modes of proceedings, at common law, of the State courts. And the principle applies as well to proceedings in chancery as at law.

The term "jurisdiction" is often used, not very appropriately, more in reference to the subject matter of the contract, or right set up, than to the capacity of the court. The capacity of the Federal Court, for the exercise of chancery powers, is received from the laws of the Union. It is not dependent for this, in any degree, on the local law. But these powers are exercised in all cases where the contract or right comes appropriately under them. If a right exist within a State which cannot be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the Federal Court. And it is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may originate under a local statute or usage, and exist nowhere else. But this constitutes no objection to its enforcement. The inquiry is, is there no adequate relief at law, and does the right come within the powers of a court of chancery.[1]

UNITED STATES FIDELITY & G. CO. v. U. S.

Supreme Court of the United States. 1907.

204 U. S. 349, 27 S. Ct. 381, 51 L. Ed. 516.

By an act of Congress approved August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," it was provided: "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing

[1] Only a portion of the opinion is reprinted.—Ed.

affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecutions shall involve the United States in no expense. Sec. 2. Provided that in such cases the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant." 28 Stat. 278, c. 280.

On the same day, August 13, 1904, Congress passed an act providing that whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond or undertaking specified, is by the laws of the United States required or permitted to be given with one or more sureties, it should be lawful to accept such instrument from a corporation having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. The act provided that any surety company doing business under the provisions of that act "may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located." 28 Stat. § 5, c. 282, p. 279.

Proceeding under the above acts the United States, in 1899, made a written contract with one Churchyard to furnish labor, materials, tools and appliances for the construction of a public building, taking from him the required bond with the United States Fidelity and Guaranty Company, a corporation, as surety.

The present action, brought in the Circuit Court on that bond, was by the United States, "suing herein for the benefit and on behalf of James S. Kenyon," who furnished a contractor for use in the construction of the proposed Government building, materials of the value of $66.05, for which the latter neglected and

refused to pay. Damages to the amount of $500 were claimed in the declaration.

The defendant, the United States Fidelity and Guaranty Company, pleaded that it did not owe the sum demanded. The plaintiff introduced testimony, but the defendant introduced none and it appearing upon the face of the declaration that the value of the matter in dispute was less than $2,000, he moved that the action be dismissed for want of jurisdiction in the Circuit Court. That motion was denied, and judgment for $206.47 was entered against the Fidelity and Guaranty Company for the use and benefit of Kenyon. United States v. Churchyard, 132 Fed. Rep. 82.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

This case is here upon a certificate as to the original jurisdiction of the Circuit Court of the United States of this action.

A Circuit Court of the United States as provided in the Judiciary Act of 1887-88, may take original cognizance of any suit, at common law or in equity, arising under the laws of the United States, if the value of the matter in dispute exceeds two thousand dollars, exclusive of interest and costs. 25 Stat. 433, c. 866. But if, within the meaning of that act, the United States is the plaintiff in the action, then jurisdiction exists in a Circuit Court without regard to such value. United States v. Sayward, 160 U. S. 493; United States v. Shaw, 39 Fed. Rep. 433; United States v. Kentucky River Mills, 45 Fed. Rep. 273; United States v. Reid, 90 Fed. Rep. 522.

The contention of the Fidelity Company is that the Government, in this case, is to be deemed a nominal party only, its name being used as plaintiff simply under the authority of the above act of 1894, c. 280. In support of this position our attention is called to the following among other cases: Browne v. Strode, 5 Cranch 303; McNutt v. Bland, 2 How. 9, 14; Maryland v. Baldwin, 112 U. S. 490; Stewart v. B. & O. R. R. Co., 168 U. S. 445.

Browne v. Strode was a suit in the Circuit Court for the District of Virginia in which the persons named in the declaration as plaintiffs were justices of the peace, all citizens of Virginia. The suit was on a bond given by an executor in conformity with a Virginia statute, and was for the recovery of a debt due from the testator in his lifetime to an alien, a British subject. The defendant was a citizen of Virginia. This court held that the Cir-

cuit Court had jurisdiction, notwithstanding the justices were nominal parties only, while the beneficial party was an alien, and the defendant a citizen of the State in which the suit was brought.

McNutt v. Bland was a suit upon a bond given by a sheriff and running to the Governor of the State, conditioned for the faithful performance of the duties of his office. The statute authorized suit to be brought and prosecuted from time to time at the cost of any party injured until the whole amount of the penalty was recovered. The suit was brought in the name of the Governor for the use of certain parties who were citizens of New York. The court held that the sheriff and his sureties, citizens of Mississippi, could be used by the parties in interest in their own name, and that no sound reason could be perceived "for denying the right of prosecuting the same cause of action against the sheriff and his sureties in the bond, by and in the name of the Governor, who is a purely naked trustee for the party injured. He is a mere conduit through whom the law affords a remedy to the person injured by the acts or omissions of the sheriff; the Governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a State court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the sheriff's bond."

Maryland v. Baldwin, 112 U. S. 490, 491, was an action in a State court on an administrator's bond in the name of the State for the benefit of one Markley, a citizen of New Jersey, the obligors in the bond being citizens of Maryland. The action was removed to the Circuit Court of the United States. After referring to the cases of Browne v. Strode, and McNutt v. Bland, the court said: "The justices of the peace in the one case and the Governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

Stewart v. Balt. & Ohio R. R. Co, was an action against a rail-

road company by an administrator to recover damages for the benefit of a widow whose husband's death was alleged to have been caused by the negligence of the defendant company. In the course of the discussion of the controlling questions in that case the court observed in passing that "for purposes of jurisdiction in the Federal Courts regard is had to the real rather than to the nominal party," and that even in an action of tort "the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought."

This case differs from those just cited and stands, we think, on exceptional grounds. The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building. Hence, the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors "shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work." The Government is a real party here because the declaration opens, "The United States, suing herein for the benefit of and on behalf of James Kenyon * * * comes and complains," and alleges that the "defendants became and are indebted to the United States for the benefit of the said James S. Kenyon." In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to materialmen and laborers. The bond is not simply one to secure the faithful performance by the contractor of the duties he owes directly to the Government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and

was therefore enforcible by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor for the construction of public works, that it is not an unreasonable construction of the words in the Judiciary Act of 1887-88, "or in which controversy the United States are plaintiffs or petitioners," to hold that the United States is a real and not a mere nominal plaintiff in the present action, and therefore that the Circuit Court had jurisdiction.

This interpretation of the statute finds some support in the above act of 1894, c. 282, passed the same day as the act, c. 280, for the protection of materialmen and laborers, and which provides that suits against a fidelity or guaranty corporation, accepted as surety in any recognizance, stipulation, bond or undertaking given to the United States, may be sued in any court of the United States having jurisdiction of suits upon such instrument. There is in that act no express limitation as to the amount involved in suits of that character in either of the acts passed in 1894. Taking the two acts together, there is reason to say that Congress intended to bring all suits, embraced by either act, when brought in the name of the United States, within the original cognizance of the Circuit courts of the United States, without regard to the amount in dispute. And this view as to the intention of Congress is strengthened by an examination of the act of February 24, 1905, 33 Stat. 811, c. 778, which amends the above statute of 1904, c. 280. After providing that persons supplying labor and materials for the construction of a public work shall have the right to intervene in any suit brought by the United States against the contractor, that act declares that if no such suit is brought by the United States within six months after completion of the contract then the person supplying labor or material to the contractor "shall have a right of action and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in con-

troversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

It is true that this statute can have no direct application here, because the present action was instituted long prior to its passage and after the trial court had decided the question of the jurisdiction of the Circuit Court. As the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked in this action. Nevertheless, that act throws some light on the meaning of the act of 1894, c. 280, for the protection of materialmen and laborers, and tends to sustain the view based on the latter act, namely, that in suits brought in the name of the Government for their benefit the United States is a real litigant, not a mere nominal party, and that of such suits, the Government being plaintiff therein, and having the legal right, the Circuit Court may take original cognizance without regard to the value of the matter in dispute. There are cases which take the opposite view, but the better view we think is the one expressed herein.

The judgment is

Affirmed.[1]

MR. JUSTICE BREWER dissents.

UNITED STATES v. HARTWELL.

Supreme Court of the United States. 1867.

73 U. S. (6 Wallace) 385, 18 L. Ed. 830.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Was the defendant an officer or person "charged with the safe-keeping of the public money" within the meaning of the act? We think he was both.

He was a public officer. The General Appropriation Act of July 23d, 1866,[2] authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a

1 See also U. S. v. Rea-Read Mill and Elevator Co., 171 Fed. 501, 510-511 (1909).

But see United States v. Henderlong, 102 Fed. 2 (1900); United States v. Sheridan, 119 Fed. 236 (1902); United States v. Barrett, 13 Fed. 189 (1905); Burrell v. United States, 147 Fed. 44, 45-46, 77 C. C. A. 308, 309-310 (1906), contra.—Ed.

2 14 Stat. at Large, 200.

specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

An office is a public station, or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.[3]

TOWN OF PAWLET v. CLARK.

Supreme Court of the United States. 1815.

13 U. S. (9 Cranch) 292, 3 L. Ed. 735.

STORY, J., delivered the opinion of the court as follows:

The first question presented in this case is, whether the court has jurisdiction. The plaintiffs claim under a grant from the

[3] United States v. Maurice, 2 Brockenbrough, 103; Jackson v. Healy, 20 Johnson, 493; Vaughn v. English, 8 California, 39; Sanford v. Boyd, 2 Cranch's Circuit Court, 78; Ex parte Smith, Id. 693.

Only that portion of the opinion which defines the word "officer" is reprinted.

The Post Master General is an officer of the United States. Post Master General v. Early, 25 U. S. (12 Wheaton) 136, 146-147, 6 L. Ed. 577, 581 (1827).

In the following cases it was held that the person in question was not an officer of the United States: United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482 (1878) civil surgeon appointed by the commissioner of pensions under U. S. Rev. St. (1878) sec. 4777; United States v. Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. Ed. 463 (1888) paymaster's clerk, appointed by a paymaster in the navy with the approval of the Secretary of the Navy; United States v. Smith, 124 U. S. 525, 8 S. Ct. 595, 31 L. Ed. 534 (1888) clerk of collector of customs; Auffmordt v. Hedden, 137 U. S. 310, 326-328, 11 S. Ct. 103, 107-108, 34 L Ed. 674, 679-680 (1890) merchant appraiser; Saunders v. U. S., 73 Fed. 782, 784 (1896) jailer of state jail; United States v. Haas, 167 Fed. 211, 214 (1906).

If one treats his duties as occasional, he cannot later successfully claim that they were permanent and that he was acting as an officer. Pray v. U. S., 14 Ct. Cl. 256, 262-263 (1878).—Ed.

State of Vermont, and the defendants claim under a grant from the State of New Hampshire, made at the time when the latter State comprehended the whole territory of the former State. The Constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of the same State claiming lands under grants of different States." It is argued that the grant under which the defendants claim is not a grant of a different State within the meaning of the Constitution, because Vermont, at the time of its emanation was not a distinct Government, but was included in the same sovereignty as New Hampshire.

But it seems to us that there is nothing in this objection. The Constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different States; and it supposed that a State tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact whether grants arose under the same or under different States. Now it is very clear that although the Territory of Vermont was once a part of New Hampshire, yet the State of Vermont, in its sovereign capacity, is not, and never was the same as the State of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of Vermont; that of the defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the States the same, than the circumstance that a part of the members of one corporation constitutes a component part of another corporation, makes the corporation the same. Nor can it be affirmed, in any correct sense, that the grants are of the same State; for the grant of the defendants could not have been made by the State of Vermont, since that State had not at that time any legal existence; and the grant of the plaintiffs could not have been made by New Hampshire, since, at that time, New Hampshire had no jurisdiction or sovereign existence by the name of Vermont. The case is, therefore, equally within the letter and spirit of the clause of the Constitution. It would, indeed, have been a suffi-

cient answer to the objection, that the Constitution and laws of the United States, by the admission of Vermont into the Union as a distinct Government, had decided that it was a different State from that of New Hampshire.[1]

COWELL v. CITY WATER SUPPLY CO.

Circuit Court of Appeals, Eighth Circuit. 1903.

121 Fed. 53, 57 C. C. A. 393.

Sanborn, Circuit Judge.—This is an appeal from a decree which sustained a demurrer to and dismissed a bill in equity against the City Water Supply Company, a corporation, and other parties, which was exhibited by William F. Cowell in the District Court of Wapello County, in the State of Iowa, in September, 1898. The suit was removed to the Circuit Court of the United States for the Southern District of Iowa on the petition of the defendants and on April 3, 1899, the complainant, Cowell, made a motion to remand the case to the State court on the ground that the matter in dispute, exclusive of interests and costs, did not exceed the sum of $2,000. This motion was denied and the ruling of the court denying it is the first error assigned. This alleged error will be first considered, because, if this ruling was erroneous, the court below was without jurisdiction to determine the merits of the case, and it will be unnecessary to state or discuss them.

When the motion to remand was made, the sum or value of the matter in dispute was determinable from the averments of the bill and an affidavit of William A. Underwood that the value of the property of the defendant the City Water Supply Company was $300,000. The bill contained allegations of the following facts: The complainant, Cowell, was the owner of one of 400 bonds, of $1,000 each, made by the Iowa Water Company, secured by a mortgage of its waterworks at Ottumwa, Iowa, and dated April 15, 1887. Default had been made in 1894 in the payment of the interest upon these bonds, and the defendants Frederick E. Potter, Winthrop Smith, Charles G. Sanford, and Frederick

[1] See also Stevenson v. Fain, 195 U. S. 165, 168-170, 25 S. Ct. 6, 49 L. Ed. 142.—Ed.

H. Mills became a committee of the bondholders, as such issued a plan for protecting the interests of the bondholders, and solicited the deposit of bonds with themselves under that plan. The complainant deposited his bond under the plan, and 327 other bonds of like amount and character were deposited with the committee in the same way. Thereupon this committee foreclosed the mortgage securing these bonds, bid in the property at the foreclosure sale, incorporated the defendant the City Water Supply Company, unlawfully issued $80,000 of preferred stock and $20,000 of common stock of this new company, conveyed the waterworks and their appurtenances to this corporation, and caused it to make two mortgages upon this property—one for $150,000 and one for $325,000—both of which, together with the bonds which they secure, are void, and constitute a fraud upon the rights of the complainant, for numerous reasons set forth at large in the bill. The committee have also organized an illegal voting trust, by means of which they hold the possession and power to vote the stock of the water supply company, and the possession and operation of the plant and property of that company. The complainant brings this suit on behalf of himself and on behalf of all others of the same class who may join in the proceeding, and his prayer is that the organization of the City Water Supply Company, the stock it has issued, and the mortgages it has made, be declared void; that his undivided interest, which he avers to be 1/325 of the property held by the City Water Supply Company, may be declared to be free from all liens and incumbrances except a lien for $51,000, evidenced by an old underlying mortgage made by the Ottumwa Waterworks Company before the mortgage which was foreclosed was executed, or that, in the event that the court should sustain the incorporation of the supply company, and the stock and mortgages it has made, the complainant may recover of the individuals constituting the committee a sum of money equal to 1/325 of $524,000 and 1/325 of $1,509.79, and 1/325 of the income and earnings of the property since it came into the hands of the committee on September 12, 1897.

It will be seen from this brief statement of the averments of the bill that the property of the City Water Supply Company was not worth, and is not claimed to be worth, more than $525,000, and that the complainant's alleged share of it was not of a value exceeding 1/325 of $525,000, or $1,615.38, while the amount of the judgment for money which he sought to recover in case the stock and the mortgages of the supply company were sustained

did not exceed $1,650, and the debt he was endeavoring to collect was only $1,000 and interest.

The Circuit courts of the United States have no jurisdiction unless "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." 25 Stat. 433; 1 U. S. Comp. St. 1901, tit. 13, § 629, p. 508.

Where a suit is brought by one of a class on behalf of himself and all others similarly situated who may join in the proceeding, the sum or value of the matter in dispute is the amount or aggregate value of the interests of those who have joined in the suit. It is not the amount or value of the interest of the entire class. Foster's Federal Practice, § 16, p. 33. As no one had joined in this suit with the complainant when the motion to remand was made, the sum or value of the matter in dispute at that time was the amount or value of that which he would gain or of that which the defendants would lose if he recovered that for which he prayed in his bill.

It was admitted by the court below, and it is conceded by counsel for the appellee, that the amount or value of the property or of the money which the complainant sought to recover in this suit was less than $2,000. But their contention is that because the complainant prays in his bill that the mortgages made by the City Water Supply Company, aggregating $475,000, be canceled and annulled, and that his 1/325 of the property covered by them may be declared to be free from their liens, the amount involved is the amount of the mortgages, $475,000, and the Federal Court has jurisdiction. In support of this contention, cases are cited in which owners of property were contesting opposing claims to it, where it is held that the value of the property the complainant claims to own is the test of jurisdiction, as in Berthold v. Hoskins (C. C.), 38 Fed. 772; Lehigh Zinc and Iron Co. v. New Jersey Zinc and Iron Co. (C. C.), 43 Fed. 545; Parker v. Morrill, 106 U. S. 1, 1 Sup. St. 14, 27 L. Ed. 72; and Smith v. Adams, 130 U. S. 167, 175, 9 Sup. Ct. 566, 32 L. Ed. 895. If the complainant were the owner of the waterworks, these cases would be controlling, and the value of that property would be the test of the jurisdiction of the court below, and that value would have sustained it. But since he claims to be the owner of only 1/325 of this property, this fraction of its value, and not its whole value, is the test of the jurisdiction in this case, and that test defeats it. In Smith v. Adams, 130 U. S. 167, 175, 9 Sup. Ct. 566, 32 L. Ed. 895, the Supreme Court said: "By 'matter in dispute' is meant

the subject of litigation—the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken." Now, the only subject of this litigation is either the bond for $1,000, or the 1/325 of the property of the City Water Supply Company, or the judgment for not exceeding $1,650 against the members of the bondholders' committee for which the complainant prays, and in either case the sum or value of the matter in dispute does not exceed $2,000. In the complainant's attack upon the mortgages, he does not seek, and he could not, in any event, secure in this suit, as it stood when the motion to remand was made, more than the discharge of the liens of the mortgages and the stock of the supply company upon his 1/325 of its property. He could not obtain more relief than the cancellation of these charges as to his interest in the property. He was the only complainant, and the interests of the owners of the other 324/325 of this property could not have been relieved from the lien of these mortgages or of this stock by any decree which the complainant alone could have secured in their absence from the suit. The jurisdictional amount in dispute, therefore, was not the entire stock of the water supply company, nor the entire amount of the mortgages, but the undivided interest in the property which the complainant sought in his bill, or the sum which he sought to recover in money of the individual bondholders, or the debt of $1,000 which he sought to collect, and in neither case did the sum or value in dispute exceed $2,000, so that the court below could not obtain jurisdiction.

In Parker v. Morrill, 106 U. S. 1, 2, 1 Sup. Ct. 14, 27 L. Ed. 72, Parker brought a suit in equity against Morrill and another to remove a cloud upon the title to some 25,000 acres of land, created by a claim set up by Morrill. Parker, who owned only the undivided twentieth of the tract, appealed from the decree dismissing his bill. The Supreme Court held that the matter in dispute was not the entire tract claimed by Morrill, but the one-twentieth of that tract owned by Parker.

In Miller v. Clark, 138 U. S. 223, 225, 11 Sup. Ct. 300, 34 L. Ed. 966, Mrs. Miller, who was one of six legatees, exhibited a bill in equity to compel the other five legatees to pay over to the executor of the will under which she claimed $5,377.83, to be divided by the executor equally among the six legatees. The defendants claimed that they had received this amount from the testatrix as a gift before her death. The Circuit Court sustained the jurisdiction. When the case arrived on appeal in the Supreme

Court, the jurisdiction of that court was challenged on the ground that the amount in dispute did not exceed $5,000, and that court held that the amount in dispute in the proceeding was not the $5,377.83 which the complainant insisted that the defendants should pay over to the executor to be distributed, but that it was the interest or share of that amount which the complainant claimed that she would ultimately be entitled to receive—that is to say, one-sixth of that amount—and upon this ground, the appeal was dismissed for want of jurisdiction. After this decision the Circuit Court dismissed the suit upon the same ground. Miller v. Clark (C. C.), 52 Fed. 900.

In Bruce v. Manchester & Keene Railroad, 117 U. S. 514, 515, 6 Sup. Ct. 849, 29 L. Ed. 990, two bondholders, holding interest coupons amounting to $3,400, brought suit to foreclose a mortgage for $500,000 which secured the payment of bonds to that amount, together with the coupons attached thereto, of which those held by the complainants were a part. Upon an appeal to the Supreme Court that court decided that the amount in dispute was not the $500,000 secured by the mortgage which the complainants sought to foreclose, but the amount of the complainants' interest therein, or $3,400, and upon this ground dismissed the appeal for lack of jurisdiction in that court.

In Werner v. Murphy (C. C.), 60 Fed. 769, 772, where a creditor whose claim was less than $2,000 brought a suit to avoid a fraudulent conveyance of property worth more than $100,000, the court held that the amount in dispute was not the value of the property fraudulently conveyed, but the amount of the complainant's claim, and it sustained a demurrer to the bill because that amount was less than $2,000.

In Smithson v. Hubbell (C. C.), 81 Fed. 593, a creditor sought to enjoin the payment of a fraudulent claim, and it was held that the amount in dispute was the amount of the claim of the creditor, and not the amount of the fraudulent claim, the payment of which that creditor sought to restrain.

Perhaps these cases sufficiently illustrate and establish the rule that it is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit courts of the United States. Parker v. Morrill, 106 U. S. 1, 2, 1 Sup. Ct. 14, 27 L. Ed. 72; Miller v. Clark, 138 U. S. 223, 225, 11 Sup. Ct. 300, 34 L. Ed. 966; Miller

v. Clark (C. C.), 52 Fed. 900; Bruce v. Manchester & Keene Railroad, 117 U. S. 514, 515, 6 Sup. Ct. 849, 29 L. Ed. 990; Werner v. Murphy (C. C.), 60 Fed. 769, 772; Smithson v. Hubbell (C. C.), 81 Fed. 593; Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; Robinson v. West Virginia Loan Co. (C. C.), 90 Fed. 770; Colvin v. Jacksonville, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053. Since that amount or value was less than $2,000 in the case at bar when the motion to remand was made, the court below never had jurisdiction of this suit, the decree below must be reversed, and the case must be remanded to the Circuit Court, with instructions to remand it to the State court from which it came, and it is so ordered.[1]

NOLEN v. RIECHMAN.

District Court, W. D. Tennessee, W. D. 1915.

225 Fed. 812.

Per Curiam.—The parties to the suit are all citizens of Tennessee and residents of Memphis. The city of Memphis, through its board of commissioners and in pursuance of the statute, has passed a resolution fixing the bond to be given by operators of motor busses at $5,000; and official orders have been given to compel operators of such vehicles to comply with the provision of the statute, which requires the execution and filing of such bond. The plaintiff is financially unable to procure the bond. The automobile he is operating will thus be materially reduced in earning power and in value to him through enforcement of the law. Street railways are in operation under charters and franchises within

[1] Judge Thayer rendered a concurring opinion which is omitted.

As to what is the amount in dispute, see further, Taylor v. Decatur Mineral & Land Co., 112 Fed. 449, 449-450 (1901) suit for dissolution of a corporation and the distribution of its assets; Humes v. City of Little Rock, 138 Fed. 929, 930, 933 (1898) suit to enjoin ordinance imposing a license tax; Louisville & N. R. Co. v. Bitterman, 144 Fed. 34, 43-45, 75 C. C. A. 192, 201-203 (1906) injunction to restrain scalping of tickets; Denver & R. G. R. Co. v. Mills, 222 Fed. 481, 485, 138 C. C. A. 77, 81 (1915) suit to restrain taking right of way; Scott v. Frazier, 258 Fed. 669, 671-674 (1919) suit to enjoin payment of public funds.

Where a suit is upon a demand on which the law liquidates the damages the amount so liquidated, and not the amount claimed in the complaint, constitutes the matter in dispute. Bergman v. Inman, Poulsen & Co., 91 Fed. 293 (1893).—Ed.

Memphis, and no such bond is required by their owners. Taxicabs are in use upon the public highways and grounds of the city; but whether operators of taxicabs are amenable to the bond requirement is reduced to a question of law between counsel. Before the passage of the statute, though no dates appear, the plaintiff obtained license to operate his car on the streets of Memphis for a period of one year.

(1) The sole ground of jurisdiction in this court is the claim of constitutional invalidity of the statute because of its alleged violation of the fourteenth amendment. In spite of the Federal question so presented, the defendants earnestly insist that the real purpose of the suit is to enjoin criminal proceedings, and that a court of equity cannot entertain jurisdiction for that reason. Before considering this feature of the defense, we feel called upon to notice a question of jurisdiction which arises upon the face of the petition. The only allegation there found upon the subject of the amount involved is that it is "greater than two thousand ($2,000) dollars." This, of course, is not in accordance with the requirement that the matter in controversy must exceed, exclusive of interest and costs, "the sum or value of three thousand dollars" (section 24, Judicial Code), nor are we at liberty to entertain jurisdiction unless this requirement is met (A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C.), 168 Fed. 762, 765, and citations). We might treat the allegation as an inadvertence, but the acknowledged inability of the plaintiff to give the statutory bond, and his limited interest in the machine operated are suggestive of a serious question as to whether the jurisdictional amount is really involved. In the absence of allegation or showing, it is hard to understand how the loss arising from an operator's inability to use a single automobile for hire can be sufficient to satisfy the statutory requirement; and it is not alleged that the plaintiff, or any one in whose behalf he brings the suit, owns or causes to be operated two or more of such machines.

The question is at once presented, then, whether the alleged loss of the plaintiff could be added to the losses of other operators similarly situated, for purposes of jurisdiction. The principle upon which such an aggregation can be employed as a test of jurisdiction is that the persons joining in the suit must have a common and undivided interest, not distinct interests, in the amount involved; still, this is not to say that, if the property involved is in truth separately owned and held, the parties may not constitute a class who may be joined for the sake of conven-

ience and economy; it is to say that aggregation of their pecuniary interests is not permissible for making up the jurisdictional amount. Clay v. Field, 138 U. S. 464, 479, 480, 11 Sup. Ct. 419, 34 L. Ed. 1044. The plaintiff and other jitney operators have a common interest, it is true, in the question whether a bond can be rightfully exacted of each of them; but it is equally plain that the damage which the plaintiff alleges, and that of other operators, as well as their titles to the vehicles they operate, are separate and distinct. It may well be, therefore, that the plaintiff can maintain a representative suit for the benefit of himself and other like operators under equity rule 38 (198 Fed. XXIX, 115 C. C. A. XXIX), and yet not be entitled to have their damages aggregated to make up the amount requisite to jurisdiction (Simpson v. Geary, 204 Fed. 507, 510 (D. C., three judges sitting); Wheless v. St. Louis, 180 U. S. 379, 381, 21 Sup. Ct. 402, 45 L. Ed. 583; Bateman v. Southern Oregon Co., 217 Fed. 933, 938, 133 C. C. A. 605 (C. C. A. 9th Circ.). See, also, Citizens' Bank v. Cannon, 164 U. S. 319, 321, 322, 17 Sup. Ct. 89, 41 L. Ed. 451; Walter v. Northeastern R. R. Co., 147 U. S. 370, 373, 374, 13 Sup. Ct. 348, 37 L. Ed. 206.[1]

In Kurtz v. Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458 (1885), Mr. Justice GRAY, after discussing the cases on the subject, said, "From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right

[1] Only a portion of the opinion is reprinted.

In the following cases plaintiffs were allowed to join the amounts of their claims: Railroad Commission of Louisiana v. Texas & P. Ry. Co., 144 Fed. 68, 72, 75 C. C. A. 226, 230 (1906); McDaniel v. Traylor, 196 U. S. 415, 426-431, 25 S. Ct. 369, 372-374, 49 L. ed. 533, 538-540 (1905).

An assignee of choses in action may join claims, if his assignors were citizens of different states from the defendant, and maintain a suit thereon, though the assignors could not have maintained separate suits, because none of the claims singly were sufficient in amount. Davis v. Mills, 99 Fed. 39, 40-41 (1900).

It is not fatal to allege that the "amount" instead of "matter" in controversy is so much. Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 574, 20 S. Ct. 222, 223, 44 L. ed. 276, 278-279 (1900).

A bill to recover an interest in lands, in which the only allegation with respect to the amount or value in controversy is that "complainants are informed and believe that the whole of said lands are worth $12,000, and the amount demanded by them herein is more than $2,000" does not meet the statutory requirement to give a federal court jurisdiction. Dupree v. Leggette, 140 Fed. 776 (1905).—Ed.

of neither party is capable of being valued in money; and therefore that writs of habeas corpus are not removable from a State court into a Circuit Court of the United States under the act of March 3, 1875, ch. 137, § 2, and this case was rightly remanded to the State court."[1]

KIRBY v. AMERICAN SODA FOUNTAIN CO.

Supreme Court of the United States. 1904.

194 U. S. 141, 24 S. Ct. 619, 48 L. Ed. 911.

Kirby filed his original amended petition in the District Court of Dallas County, Texas, against the American Soda Fountain Company, averring that he was induced by false representations by defendant to agree to exchange his soda fountain apparatus for the soda fountain apparatus of defendant and pay defendant $2,205 in addition, and signed a memorandum in relation thereto, which, however, plaintiff alleged did not contain all the terms of the contract; that the exchange was made, but defendant's soda fountain apparatus, instead of being superior in value by $2,025, was, as matter of fact, less by $2,500; and plaintiff prayed for the cancelation of the obligation to pay $2,025, for $2,500 damages, and for general relief. The original petition sought damages merely, and in the sum of $1,500.

On application of defendant the cause was removed to the Circuit Court of the United States for the Northern District of Texas.

The case was entered in that court May 12, 1902, and on that day the defendant filed its answer, denying all charges of fraud. It further said plaintiff ought to take nothing by his suit, and prayed judgment for the sum of $1,700, and foreclosure of a mortgage lien which it had on the soda fountain sold to the plaintiff.

Together with its answer defendant filed its cross complaint, setting up the facts in detail and praying for judgment in the sum of $1,700, and interest, and for a decree establishing its mortgage lien on the property and for foreclosure and sale, and such further relief as equity might require.

[1] See 3 Foster Federal Practice (5th Ed.) pp. 2438-2439 for various cases exemplifying this doctrine.—Ed.

On June 20, 1902, the original bill of complaint was dismissed without prejudice.

July 24, 1902, plaintiff, as defendant in the cross complaint, filed his plea thereto, in which he averred that the original bill filed by him had been dismissed, and that the cross bill was not within the jurisdiction of the court because the amount sought to be recovered did not exceed two thousand dollars, exclusive of interest and costs. February 13, 1903, the plea to the jurisdiction of the court was argued and overruled, and plaintiff, defendant in the cross bill, was ordered to file an answer to said cross bill on or before the rule day of the court occurring in April, 1903. No further answer or plea to the cross bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against him April 21.

On May 27, 1903, the court rendered a decree on the cross bill, which recited the various proceedings, found the allegations of the cross complaint and exhibits to be true; that Kirby was justly indebted to the American Soda Fountain Company in the sum of $1,700, with interest; and that a valid mortgage lien to secure that sum existed; and decreed payment of the amount within sixty days, and that, if not paid, the property should be sold and the proceeds applied, with judgment for deficiency, if any.

An appeal from this decree was prayed and allowed, and the question of jurisdiction was certified. The case came on in this court on motions to dismiss or affirm.[1]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The contention is that the Circuit Court had no jurisdiction as a court of the United States to proceed on the cross bill because of the lack of the prescribed jurisdictional amount. But we think the Circuit Court was right in rejecting this contention and in overruling the plea.

In the first place, the whole record being considered, the value of the matter in dispute might well have been held to exceed two thousand dollars, exclusive of interest and costs. Stinson v. Dousman, 20 How. 461, 466; New England Mortgage Company v. Gay, 145 U. S. 123, 131; Shappirio v. Goldberg, 192 U. S. 232; Lovell v. Cragin, 136 U. S. 130.

[1] The facts are restated and only a portion of the opinion is reprinted.—Ed.

In Stinson v. Dousman the suit was brought to recover something less than five hundred dollars as rent of a parcel of land under a written contract for the purchase of the land at eight thousand dollars, which provided that the covenantee should pay rent on failure to comply with sundry conditions prescribed, and defendant not only set up in his answer a defense to the claim for rent, but also sought a decree affirming the contract as outstanding. It was objected in this court that the matter in dispute was not of the value of one thousand dollars, and that therefore there was no jurisdiction. Mr. Justice CAMPBELL said: "The objection might be well founded, if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $8,000. We think this court has jurisdiction. The case is cited and considered in New England Mortgage Company v. Gay and in Shappirio v. Goldberg.

In Lovell v. Cragin it was held as correctly stated in the headnotes: "When the matter set up in a cross bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

In the present case the Circuit Court in its decree referred to the plaintiff's bill and the relief thereby sought, in connection with the cross bill, and, we think, was justified in doing this as the record has not passed from under its control, and it was apparent that the decree on the cross bill disposed of the contention of plaintiff in respect of the cancellation of the contract. Taking the bill, defendant's answer and the cross bill together, the jurisdictional amount was made out.

In the second place, it is the general rule that when the jurisdiction of a Circuit Court of the United States has once attached it will not be ousted by subsequent change in the conditions. Morgan v. Morgan, 2 Wheat. 290; Clarke v. Mathewson, 12 Pet.

164; Kanouse v. Martin, 15 How. 198, 208; Roberts v. Nelson, 8 Blatchf. 74; Cooke v. United States, 2 Wall. 218.

In Morgan v. Morgan it was laid down by Chief Justice MARSHALL that the jurisdiction of the Circuit Court having once vested between citizens of different States, could not be divested by a change of domicil of one of the parties, and his removal into the same State as the adverse party *pendente lite*. This was so ruled in Clarke v. Mathewson and other cases there cited.

In Kanouse v. Martin, after petition to remove had been filed and bond tendered, the State court allowed the plaintiff to reduce the matter in dispute to less than the jurisdictional amount, and went on with the case. This was necessarily held to be erroneous, but the observations of Mr. Justice CURTIS show that, in his opinion, the general rule to which we have referred also applied, and he cites Morgan v. Morgan and Clarke v. Mathewson.

In Roberts v. Nelson the amount claimed was reduced after the case had been removed, and Mr. Justice BLATCHFORD, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it.

In Cooke v. United States Mr. Chief Justice CHASE said that "jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."

This action, when brought in the State court, was an action to recover $1,500 damages for deceit. Defendant demurred to and answered the original petition. Plaintiff subsequently filed his amended petition seeking to be relieved of the obligation to pay $2,025, and damages in the sum of $2,500. The matter in dispute having thus been made to exceed the sum or value of two thousand dollars, exclusive of interest and costs, defendant presented his petition and bond for removal, and the cause was thereupon removed. The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action.

Decree affirmed.[1]

[1] A plaintiff cannot confer jurisdiction on a federal court of an action on account for the price of goods sold by ignoring in his petition a credit to which the defendant is entitled on the account by agreement of the parties, the right to which is in fact undisputed, and which, if allowed reduces the amount in controversy below the jurisdictional amount. Bedford Quarries Co. v. Welch, 100 Fed. 513 (1900).

Compare Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fert. Co., 80 Fed. 68, 69 (1897).

GREENE COUNTY BANK v. J. H. TEASDALE COMMISSION CO.

Circuit Court, E. D. Missouri, E. D. 1902.

112 Fed. 801.

Adams, District Judge.—This is a bill for a discovery and an accounting. The complainant charges, in substance, that it is a banking corporation, and that one Ritter is its cashier; that the defendant is a commission house transacting the business of buying and selling grain and other commodities for customers, and that in the course of its business it has been in the habit of permitting its customers to put up "margins," as it is called, and thus to buy and sell partially on credit, in lieu of paying for the grain or other commodities purchased in full. The complainant charges that beginning with the year of 1896, and ending with the year 1900, its cashier, Ritter, took advantage of his situation as custodian of its money, and used the same for the purpose of speculating in grain with the defendant commission company; that Ritter so used its money to the extent of more than $2,000, the exact amount of which the complainant did not know, but believed to be not less than $15,000. It is charged in the bill that defendant commission company knew that Ritter was making use of complainant's money for the purpose of carrying on his speculations, and that the commission company received from time to time during the four years in question a large sum of money from Ritter, which he had abstracted from complainant's funds, and which the defendant knew he had so abstracted. Complainant alleges ignorance as to the exact amount so employed by Ritter, and submits divers interrogatories in the bill for defendant's officers to answer. The defendant appears and files a plea to the jurisdiction, alleging, in substance, that the suit does not involve a controversy amounting to $2,000, exclusive of interest and costs. By several affidavits made by the officers and agents of defendant company it is made to appear that Ritter first began to do business with defendant, and to make purchases and sales of grain through defendant's agency, on December 8, 1899, and continued such business only until November 27, 1900; that the total amount of all business transactions between Ritter and defendant company during this period was $1,715.56, and that the total amount of money paid by Ritter directly or indirectly during the entire

period, covering the business transactions between Ritter and the defendant, was only $1,094.59; therefore that under no circumstances could there be a recovery of over $1,094.59. On the foregoing showing it is claimed that the plea to the jurisdiction should be sustained.

I think this plea discloses a misconception of the rule governing the question of jurisdiction. According to the method adopted by defendant's counsel, it would be competent in any case for the defendant to allege in a plea to the jurisdiction that the amount claimed by a plaintiff was too much, and then proceed to have a hearing by ex parte affidavits touching the same; and on the same theory, of course, defendant might challenge the jurisdiction of the court on the ground that nothing was due the plaintiff, and proceed to try the whole case by ex parte affidavits. This method substitutes the trial by affidavit for the ancient and well-established method of taking the testimony by deposition or by an examiner, in such way as to permit searching examination and cross-examination of the witnesses. The general rule is that the sum demanded in the declaration or bill determines, for all jurisdictional purposes, the amount in controversy. Hilton v. Dickinson, 108 U. S. 165, 174, 2 Sup. Ct. 424, 27 L. Ed. 688. This is especially true in all actions for recovery of money only, like the action now before the court. The amount demanded by the plaintiff in good faith is the test of jurisdiction, so far as that is dependent upon the amount in controversy. In Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 505, 13 Sup. Ct. 416, 417, 37 L. Ed. 255, it is said:

"The fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by defendants, or, if presented, will be sustained by the court?"

From the foregoing cases the rule appears to be that in all actions for the recovery of money the amount claimed in the complaint in good faith determines the jurisdiction of the court, so far as the amount in controversy may be involved. There is a well-recognized exception, however, to this rule, where it appears from the complaint that the amount claimed is evidently fictitious, and alleged for the purpose simply of giving color to jurisdiction, —in other words, where the plaintiff obviously is by allegation attempting to commit a fraud upon the jurisdiction of the court.

Cases of this character are represented by the following: Bowman v. Railroad Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502; Bank of Arapahoe v. David Bradley & Co., 19 C. C. A. 206, 72 Fed. 867, and cases cited. These cases, after recognizing the general rule that, in all actions for the recovery of money only, the amount demanded by the plaintiff in good faith determines the jurisdiction, also recognize as exception,—that where the claim asserted in the complaint is manifestly fictitious, and made for the purpose of imposing upon the court a case not within its jurisdiction, the court will ignore the statement of the claim demanded, and summarily put an end to the fraud attempted to be practiced upon its jurisdiction. It is manifest from the averments of the bill in this case that there is no such evidence of bad faith on the part of the complainant as to justify the court's intervention to protect itself from fraudulent imposition. The cases relied upon by defendant's counsel are not inconsistent with the foregoing rule. They are not for the recovery of money only, but are cases in which real estate or some specific personal property is sought to be recovered. Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, was an action in ejectment, in which the court laid down the rule that a trial court might hear the issue as to the amount in controversy by affidavits, or in any other manner which its discretion and judgment might dictate. Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508, was also a suit relating to a tract of land. The title was disputed, and the jurisdiction depended upon the value of the land itself. In that case the Supreme Court took occasion, at the outset of its comments on the question of jurisdiction, to observe that "the suit was not one to recover a sum of money." Wilson v. Blair, 119 U. S. 387, 7 Sup. Ct. 230, 30 L. Ed. 441, was also an action for the possession of real estate, and the jurisdiction depended upon the value of the matter in controversy. In that case leave was given the defendant in the trial court to file affidavits of value, and the plaintiff to file counter affidavits; and the court took occasion to say it was good practice to settle the question of jurisdiction in that way, and, "if oftener adopted, would save trouble" to parties and the court. That case, however, was not to recover a particular sum of money alleged to be due, growing out of disputed transactions, but to recover the possession of real estate susceptible of actual valuation, whereby jurisdiction could be readily determined. Barry v. Edmunds, 116 U. S. 550, 6 Sup.

Ct. 501, 29 L. Ed. 729, was an action for the malicious seizure of personal property for the payment of taxes alleged to have been unconstitutional. The value of the property seized was less than $200, but the plaintiff alleged that the action of the officer in seizing the same was malicious, and done with the purpose of injuring the plaintiff's credit. By reason thereof, plaintiff claimed vindictive damages in the sum of $6,000. The trial court had dismissed the case on the ground that the complaint showed that the matter in dispute did not exceed, exclusive of costs, the sum or value of $500, which was then the limit of jurisdiction. The Supreme Court disapproved of that action of the trial court, and held that the amount claimed in the complaint was the test of jurisdiction. In so doing the court enters into an interesting discussion of what would be a colorable demand, and, among other things, says:

"It is true, indeed, that in some cases it might appear, as matter of law, from the nature of the case as stated in the pleadings, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum."

This doctrine is the same as that announced by the Circuit Court of Appeals of the Eighth Circuit in the case of Bank of Arapahoe v. David Bradley & Co., *supra*. The court then proceeds to quote from an opinion delivered by Chief Justice ELLSWORTH in the very early case of Wilson v. Daniel, 3 Dall. 401, 407, 1 L. Ed. 655, as follows:

"The nature of the case must certainly guide the judgment of the court, and, whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for $100, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at $10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribed no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but, where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

The court, however, modifies the rule so stated by Chief Justice ELLSWORTH by declaring, in effect, that when the amount of damages stated in the declaration is colorable, and laid beyond the amount of a reasonable expectation of recovery for the purpose of creating a case within the jurisdiction of the court, no jurisdiction is thereby conferred. The case of Lee v. Watson, 1 Wall. 337, 17 L. Ed. 557, which was an action upon a money demand, well illustrates what is meant by a "colorable demand," within the purview of the law relating to jurisdiction. Here the court says:

"In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff. It certainly would not be pretended that this court would hear a case where the plaintiff counted solely upon a promissory note of $200, simply because he concluded his declaration with an averment that he had sustained damages from its nonpayment of over $2,000, and prayed judgment for the latter sum. * * * The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled by the allegations in the body of the declaration."

In the light of the foregoing case, I think the rule may be safely stated that, in an action for the recovery of money only, the amount of damages claimed determines the jurisdiction of the court, unless the declaration upon its face shows that the sum is claimed in bad faith, and merely for the purpose of imposing a colorable jurisdiction upon the court. In other cases not for the recovery of money, but for the recovery of land or articles of specific property, an inquiry may be made, on a plea to the jurisdiction, by affidavit or other convenient method, as to the real value of the subject of controversy. The case now before the court clearly belongs to the class first mentioned, namely, for the recovery of money. In its bill the complainant alleges that it is certainly entitled to recover $2,000, exclusive of interest and costs, and believes it is entitled to recover $15,000. There is nothing apparent on the face of the bill to disclose, as a matter of law, that complainant cannot recover $2,000 and more, or bad faith, or any

purpose to impose upon the court a jurisdiction not belonging to it. On the contrary, there is every evidence of perfect good faith to recover a sum of money necessarily uncertain, and dependent upon judicial investigation to determine its amount. Such being the case, the defendants cannot by ex parte affidavits, taken out of court, conclude the whole case upon its merits, on a plea to the jurisdiction.

The plea must be adjudged bad and overruled.

EDWARDS v. BATES COUNTY.

Supreme Court of the United States. 1896.

163 U. S. 269, 16 S. Ct. 967, 41 L. Ed. 155.

On October 5, 1891, plaintiff in error filed his petition to recover from the defendant an aggregate alleged indebtedness, consisting of the following items:

1. The principal of two bonds for one thousand dollars each, issued by the defendant on January 18, 1871, with interest from the date of maturity of the bonds (January 18, 1886);

2. The amount of interest coupons on said bonds, due and payable on the eighteenth day of January, in the years 1873 and 1886, both inclusive, with interest from the maturity of each coupon; and,

3. The principal of seven funded bonds of said county, each for the sum of one hundred dollars, dated October 1, 1885, and payable October 1, 1905. * * *

A plea to the jurisdiction was filed on behalf of the defendant, based upon the claim that the matter in controversy, exclusive of interest and costs, did not exceed the sum or value of $2,000.

The trial court sustained the plea, and dismissed the case for want of jurisdiction. 55 Fed. Rep. 436. The case was then brought to this court by writ of error.[1]

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the court.

[1] Only a part of the facts are reprinted.—Ed.

We are solely concerned in this case in determining whether or not the Circuit Court possessed jurisdiction over the claim asserted in the petition. Act of March 3, 1891, c. 517, § 5.

From the facts heretofore detailed the following questions arise:

First, Should the Circuit Court have taken into consideration, for the purpose of ascertaining the adequacy of the jurisdictional amount, the claim of plaintiff upon the interest coupons attached to the two one thousand dollar bonds?

Second. Did the court rightly hold that the amount of the claim upon the funding bonds was not an item "in dispute" between the parties, and therefore not proper to be taken into account in determining whether the court possessed jurisdiction?

As to the first point. By the act of Congress of March 3, 1887, c. 373, as amended August 13, 1888, c. 866, 25 Stat. 434, original jurisdiction was conferred upon Circuit courts of the United States, "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, * * * in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."

It is contended that an indebtedness for the face amount of coupons is an indebtedness for "interest" within the meaning of the statute.

The nature of a coupon was thus defined in Aurora v. West, 7 Wall. 82, where this court said (p. 105):

"Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached."

Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or other coupons, and gives rise to a separate cause of action. Nesbit v. Riverside Independent District, 144 U. S. 610. In that case this court said (p. 619):

"Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the

promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments upon different paper."

Not only may a suit be maintained upon an unpaid coupon, in advance of the maturity of the principal debt, but the holder of a coupon is entitled to recover interest thereon from its maturity. Amy v. Dubuque, 98 U. S. 470, 473. The logical effect of these rulings is that when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation. Clearly, such would be the nature of the claim of one who as owner of the coupons and not of the bonds, brought his action to enforce payment of the indebtedness evidenced by the coupons. So, also, before maturity of the bonds, their holder could still have sued upon the matured coupons as an independent indebtedness, and not as a mere accessory to a demand for a recovery of the face of the bonds. No good reason, therefore, exists for creating a distinction between such cases and the case at bar in which there is coupled with the demand to recover upon the coupons a demand for judgment upon the bonds. The confusion of thought to which we alluded in the case of Brown v. Webster, 156 U. S. 328, is also involved in the decision below, that is, the failure to distinguish between a principal and accessory demand. The claim made by the plaintiff on the coupons was in no just sense accessory to any other demand, but was in itself principal and primary. In ascertaining, therefore, the jurisdictional sum in dispute, the sum of the coupons should have been treated as an independent, principal demand and not as interest; and in holding otherwise the lower court erred to the prejudice of the plaintiff in error.

As the face of the bonds amounted to the sum of two thousand dollars, the addition of the demand based upon the coupons brought the sum in dispute within the jurisdiction of the Circuit Court. It is, therefore, unnecessary to consider whether the controversy as to the funding bonds did not involve a real matter "in dispute" between the parties.

The judgment is reversed and the cause is remanded with directions to set aside the order dismissing the action for want of jurisdiction, and for further proceedings in conformity to law.

SWOFFORD v. CORNUCOPIA MINES OF OREGON.

Circuit Court, D. Oregon. 1905.

140 Fed. 957.

Gilbert, Circuit Judge.—This cause was removed to this court from the Circuit Court of the State of Oregon for Baker County. The plaintiff moves to remand, on the ground that this court has no jurisdiction of the controversy. The petition alleges as grounds for removal diversity of citizenship, prejudice, and local influence, and the fact that the cause presents a Federal question, in that a receiver in bankruptcy is one of the parties defendant. It alleges, also, that the amount in controversy exceeds $2,000, exclusive of interest and costs. The cause is not removable under any of the grounds stated in the petition, unless the necessary jurisdictional amount in controversy clearly appears. Pierson v. Philips (C. C.), 36 Fed. 837; Hallam v. Tillinghast (C. C.), 75 Fed. 849; Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Black's Dillon on Removal of Causes, § 48. A trustee or a receiver in bankruptcy cannot remove a cause to this court unless the amount involved exceeds $2,000. Collier on Bankruptcy (4th Ed.) 247, and cases there cited.

The complaint is brought to enforce a miner's lien under section 5558, B. & C. Comp. Or. The plaintiff alleges that he has perfected two such liens for work done upon the Cornucopia Mines of Oregon, the aggregate of which is $1,905.50. He claims in addition thereto attorney's fees in the amount of $750 under section 5672, B. & C. Comp. Or., which contains the following provision:

"In all suits under this act the court shall, upon entering judgment for the plaintiff, allow as part of the costs all moneys paid for the filing and recording of the lien and also a reasonable amount as attorney's fees."

The question presented is whether the attorney's fee so provided for as costs may be added to the amount of the liens, so as to create the amount in controversy which is necessary to give this court jurisdiction. The defendants cite and rely upon Rogers v. Riley (C. C.), 80 Fed. 759, in which it was held that where by express stipulation, valid in the state where made, a debtor becomes liable for reasonable attorney's fees in case the debt is collected by suit, such fee is not a part of the costs which are excluded under the judiciary act, but may be added to the amount

of the debt for the purpose of making up the jurisdictional amount. This was held expressly upon the ground that the obligation to pay a reasonable attorney's fee was a contractual one, and was an existing liability at the date of bringing the suit. But in the present case there was no such contractual liability to pay attorney's fees. The corporation for which the work was done had not promised to pay attorney's fees. The obligation is purely statutory, and is declared by the statute to be allowable upon entering a judgment for the lien claimant as a part of the costs. In 11 Cyc. 105, it is said:

"In jurisdictions where stipulations for the payment of attorney's fees are considered valid, these fees are taxable as costs."

This is especially true in jurisdiction where by statute it is declared that attorney's fees shall be treated as part of the costs, notwithstanding that the obligation to pay them may rest in the contract of the parties. Spiesberger Bros. v. Thomas, 59 Iowa 606, 13 N. W. 745. The amount in controversy in the present suit is therefore the sum of the liens, exclusive of attorney's fees, and is not sufficient to sustain the jurisdiction of the court.

The motion to remand is allowed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. MOTTLEY.

Supreme Court of the United States. 1908.

211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.[1]

[1] The facts are omitted, as well as a long list of cases found at the close of the opinion.

Where it affirmatively appears from the allegations of a bill that a federal question is directly involved, it is not essential to the jurisdiction of a federal court that diversity of citizenship between the parties should also appear. San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 90 Fed. 516, 520 (1898).

Facts of which the court will take judicial notice need not be alleged to show there is a federal question involved. North American Cold Storage Co. v. City of Chicago, 151 Fed. 120, 122 (1907).

When federal jurisdiction is invoked on the ground that federal questions are involved, jurisdiction depends on the questions presented by the pleadings and not on the ultimate determination thereof. Portland Ry., Light & Power Co. v. City of Portland, 210 Fed. 667, 669 (1914). Merely stating that a federal question if involved is insufficient. Facts must be averred to prove the statement. Dowell v. Griswold, 7 Fed. Cas. No. 4,041, p. 996, 997, 5 Sawyer 39, 40-41 (1877).—Ed.

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. 584), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons, who in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in violation of the Fifth Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. Mansfield, etc., Railway Company v. Swan, 111 U. S. 379, 382; King Bridge Company v. Otoe County, 120 U. S. 225; Blacklock v. Small, 127 U. S. 96, 105; Cameron v. Hodges, 127 U. S. 322, 326; Metcalf v. Watertown, 128 U. S. 586, 587; Continental National Bank v. Buford, 191 U. S. 119.

There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit * * * arising under the Constitution and laws of the United States." Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In Tennessee v. Union & Planters' Bank, 152 U. S. 454, the plaintiff, the State of Tennessee, brought suit in the Circuit Court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the

State. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United States, which forbids any State from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice GRAY (p. 464), "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in Boston & Montana Consolidated Copper & Silver Mining Company v. Montana Ore Purchasing Company, 188 U. S. 632, the plaintiff brought suit in the Circuit Court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice PECKHAM (pp. 638, 639):

"It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up and then attempt to reply to such defence, and this, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.

"Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

"The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defence of defendants would be and complainant's

answer to such defence. Under these circumstances the case is brought within the rule laid down in Tennessee v. Union Planters' Bank, 152 U. S. 454. That case has been cited and approved many times since, * * * "

The application of this rule to the case at bar is decisive against the jurisdiction of the Circuit Court.

It is ordered that the

Judgment be reversed and the case remitted to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

ST. PAUL, M. & M. RY. CO. v. ST. PAUL & N. P. R. CO.

Circuit Court of Appeals, Eighth Circuit. 1895.

68 Fed. 2, 15 C. C. A. 167.

The State of Minnesota conferred upon the St. Paul & Pacific Railroad Company, the interest of the State in a large quantity of land granted to the State by Congress, in aid of the construction of a railroad, by certain acts which provided that the title to the lands should only be acquired as the road adjacent to the particular lands was completed. By subsequent proceedings, the St. Paul & Pacific Railroad Company was practically divided into two corporations, the second known as the First Division Company. The First Division Company constructed a large part of the road, and the governor of the State, acting in his official capacity and upon the supposition that such lands had been duly earned by the First Division Company, conveyed large quantities of land to it, including some land beyond the furthest point to which the road was built. The deeds were duly recorded at the times when they were made, in 1866 and 1871, and the First Division Company sold and conveyed large amounts of the lands covered by them. The St. Paul & Pacific Railroad Company having failed to construct a part of the line, the legislature of Minnesota, on March 1, 1877, passed an act to provide for its completion, forfeiting the grants previously held by the St. Paul & Pacific Railroad Company appertaining to the uncompleted portion of the line, and authorizing any corporation organized to build a railroad in the State to acquire the right to complete the line,

and upon so doing, and complying with the act, to be invested with the rights, lands, and property appertaining to the portion of the road it should complete, and formerly held by or belonging to the St. Paul & Pacific Railroad Company. This act contained provisions for reserving part of the lands by the State, to pay claims for labor and materials used in completing the road, and excluding any corporation which should take advantage of it from acquiring title to any land in the grant upon which any settlement had been made or pre-emption claim filed. It did not appear that, at the time of the passage of this act, the validity of the deeds executed by the governor in 1866 and 1871 had ever been questioned. The complainant corporation complied with the provisions of the act, and completed the road, including the part beyond the point at which the First Division Company stopped.

The question involved is as to whether or not the complainant corporation can successfully maintain that the deeds of the governor of land beyond the furthest point to which the First Division Company's road was built were intended to be declared void by the legislative act of March 1, 1877, so that the complainant corporation could obtain a cancellation of them as clouds upon its title and compel the defendant company to account for the proceeds of such of said lands embraced in said deeds as it had sold and conveyed to third persons.[1]

THAYER, Circuit Judge, after stating the case, delivered the opinion of the court.

The first question presented for consideration is one of jurisdiction, and, as both parties to the suit are corporations created by and existing under the laws of the State of Minnesota, the decision of the jurisdictional question turns upon the inquiry whether the case is one arising under the laws of the United States. Since the recent decisions in Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; and Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 194,—it must be regarded as settled that the Circuit Court of the United States cannot entertain jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, whether such suit is commenced therein originally, or is brought there by removal, unless the plaintiff's complainant or declaration shows that it is a case

[1] The facts are restated, part thereof being copied from the syllabus.—Ed.

arising under the Federal Constitution or National laws or treaties. And even under the Judiciary Act of March 3, 1875 (18 Stat. 470, c. 137), the same rule, it seems, was applicable to suits originally brought in the Circuit Court; that is to say, under that act the right to entertain a case brought therein originally, on the ground that it involved a Federal question, depended upon the inquiry whether the plaintiff's statement of his cause of action showed the existence of a Federal question. Tennessee v. Union Planters' Bank, *supra;* Metcalf v. Watertown, 128 U. S. 586, 589, 9 Sup. Ct. 173. The necessary result of this doctrine is that, when a complaint filed in the Circuit Court of the United States discloses a controversy arising under Federal laws, the jurisdiction of the court will not be defeated by any defense or plea that the defendant may see fit to make. If the plaintiff's right to sue in the National courts is to be tested solely by his complaint or declaration, and is not aided by any plea interposed by the defendant, no matter how clearly the latter may show that the construction or application of Federal laws is involved, then it follows that, if jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any Federal question or questions. In other words, as was said, in substance, in Osborn v. Bank, 9 Wheat. 738, 824, the right of the plaintiff to sue does not depend upon the defense which the defendant may choose to set up, because the right to sue exists, if at all, before any defense is made, and must be judged exclusively as of the date of the filing of the complaint, on the state of facts therein disclosed. If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a Federal question, it has the right to decide every issue that may subsequently be raised, and whether the decision of the case ultimately turns on a question of Federal, local, or general law is a matter that in no wise affects the jurisdiction of the court. Mayor v. Cooper, 6 Wall. 247; Railroad Co. v. Mississippi, 102 U. S. 135, 141; Tennessee v. Davis, 100 U. S. 257, 264; Omaha Horse Railway Co. v. Cable Tramway Co., 32 Fed. 727.

In the light of these principles, we proceed to inquire whether any question of a Federal character is presented by the bill of complaint which it may become necessary to decide in disposing of the issues involved in the present controversy. In the consideration of this question we do not deem it essential to state in detail

all of the allegations of the amended bill, on which the case appears to have been tried and decided. It will suffice to say in this behalf that the amended complaint set forth by appropriate allegations all of the legislation, both State and National, affecting the land grant in question, and all of the facts and circumstances pertaining thereto, which we have already recited at length in the foregoing statement. In addition to such averments, the amended bill also alleged, in substance, that the lands now in controversy, being those situated north of Watab, were conveyed by the governor of the State of Minnesota to the First Division Company before the line of the road along which they specifically lay in place was completed through and coterminous therewith; that the road abreast of which the disputed lands lie was constructed by the plaintiff company, and not by the First Division Company; that no part of said lands ever belonged or pertained to that part of the branch line which was constructed by the First Division Company, and that, in executing the deeds for the lands in controversy to the First Division Company, the governor of the State acted "wrongfully and without authority of law," and that the deeds so executed were "contrary to law, and void." The bill further averred that the plaintiff company was the owner of, and that it laid claim to, all the lands in dispute; and that the defendant company had no interest therein or right thereto; and it contained a prayer that the plaintiff company be decreed to be the owner of said lands, and that the deeds executed by the governor be adjudged to be null and void, and that the same be canceled as a cloud upon its title. In all of its essential features, therefore, the case made by the amended complaint was a suit to remove a cloud and to quiet title. It does not follow, however, that the case at bar is one of Federal cognizance because it contains a reference to numerous acts of Congress, and lengthly extracts therefrom. A case which in fact depends for its decision upon questions of local or general law cannot be brought within the jurisdiction of a Federal tribunal as one arising under the Constitution and laws of the United States merely by a reference in the complaint or declaration to some Federal statute or statutes, and by setting up a claim thereunder which is merely colorable, and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the Federal courts would be unduly enlarged, and made to comprehend a class of cases which were never intended to be tried therein. New Orleans v. New Orleans Water Works, 142 U. S. 79, 12 Sup.

Ct. 142; Hamblin v. Land Co., 147 U. S. 532, 13 Sup. Ct. 353; St. Louis, etc., Ry. Co. v. State of Missouri, 15 Sup. Ct. 443.

At this point it accordingly becomes necessary to examine the various grounds upon which the plaintiff company predicates its right to recover. It is obvious that it derives its right to sue solely from the act passed by the legislature of the State of Minnesota on March 1, 1877, the material provisions of which act have been embodied in the foregoing statement. In the absence of that enactment, the plaintiff company would have no standing in any court, State or Federal, to challenge the defendant's title to the lands in controversy, whether the deeds conveying the same are valid or invalid, void or voidable. The first question, then, that is encountered in the case is whether, by the act last aforesaid, the legislature of the State in fact intended to transfer the lands north of Watab, which had theretofore been deeded by the governor of the State to the First Division Company, to such other railroad company as might construct the uncompleted line of road from Watab to Brainerd, and whether, if it did so intend, the language of the act was adequate to vest in such company as elected to complete the road a legal title to such lands north of Watab and within the limits of the grant as the State then had power to convey. With respect to this question, a controversy arises between the two companies. It is the primary issue in the case. And it must be conceded, we think, that this controversy between the parties raises a question of local law which is in no wise dependent for its decision upon the construction of any Federal statute. But if this primary question is decided in the affirmative, as the plaintiff contends that it ought to be, such decision is not decisive of the plaintiff's right to recover. It is merely one step in the direction of a recovery, and, for that reason, it cannot be said that the plaintiff's cause of action is founded solely on a State law, and that it grows out of the act of March 1, 1877. To entitle the plaintiff to a decree, it must further show that the deeds executed by the governor covering lands north of Watab were invalid; that the title of the State to said lands was not divested by the execution of said deeds, and that on March 1, 1877, the legislature of the State still had power to convey said lands by legislative enactment of such company as might elect to construct the uncompleted line from Watab to Brainerd. It is apparent, we think, that the plaintiff endeavors to establish the foregoing proposition that the deeds were in fact void, and that the lands in controversy remained subject to the disposal of the State of

Minnesota, because of the invalidity of the prior conveyances, on two grounds. In the first place, it insists that the Litchfield agreement of date February 6, 1864, which was subsequently approved and confirmed by the State, operated as a division of the land grant pertaining to the branch line, so that neither Litchfield nor his successor in interest, the First Division Company, could thereafter acquire any right or title whatsoever to any lands pertaining to said grant lying north of Watab, whether they were located within the place or indemnity limits. This, without doubt, is the ground on which the plaintiff chiefly relies for the purpose of establishing the proposition that the governor acted wholly without authority in executing deeds in favor of the First Division Company for the lands now in controversy. But, in addition to such contention, plaintiff also insists, and the allegations of the bill seem to be sufficiently full and specific to furnish a foundation for such contention, that the deeds in question were also unauthorized and void by virtue of limitations and conditions found in the several acts of Congress by which the lands in controversy were granted to the territory and State of Minnesota, in trust, to aid in the construction of a branch line of road from St. Anthony, via Anoka, St. Cloud, and Crow Wing, to St. Vincent. In support of this position, it is contended, in substance, that the state held the legal title to all the lands embraced in the grant in trust, and that it could only convey the same on the conditions prescribed in the several acts of Congress which created the trust; that, upon a true construction of the grant, the State had no power to convey lands lying within place limits, in advance of construction, after the first 120 sections had been sold; that it had no power to convey lands to any railway company unless the tracts so conveyed were "included within a continuous length of twenty miles of road;" that the granting act of March 3, 1857, set apart and appropriated to the construction of each consecutive section of 20 miles of road the place lands lying abreast of or coterminous with each section, and that the granting act of March 3, 1865, in like manner set apart and appropriated to the construction of each consecutive section of 10 miles of road enough place and indemnity lands coterminous therewith to make altogether 100 sections of land for each 10 miles of road. It is insisted that the deeds now in controversy are invalid, without reference to State legislation, because they were executed by the governor of the State in violation of each of the foregoing provisions claimed to have been contained in said acts of Congress.

The ground first stated, on which the plaintiff company bases its claim that the deeds executed by the Governor were invalid, does not involve the consideration or decision of any Federal question. In construing the Litchfield agreement, and in determining what lands the St. Paul & Pacific Railroad Company intended by that contract to transfer to Litchfield and his associates, it might be found expedient, or even necessary, to consult the act of Congress of March 3, 1857, which is referred to therein, and with reference to which the contract appears to have been executed. But, after all, the point at issue upon this branch of the case is the true construction of that agreement, and that is clearly a question of general and local law, inasmuch as the right asserted by the plaintiff depends upon the agreement, and the local statute by which it was adopted and confirmed. A case does not become one of Federal cognizance because it may be found necessary, in construing a private contract or a local law from which the rights of the respective parties are derived, to consult some Federal statute with a view of ascertaining the meaning of the contract or the scope and effect of the local law. In such cases the cause of action or the defense, as the case may be, is not founded on a law of the United States in any such sense as to bring the suit within the jurisdiction of the Federal courts. Miller's Ex'rs v. Swann, 150 U. S. 132, 14 Sup. Ct. 52. It is equally clear, however, that in so far as the plaintiff company challenges the validity of the deeds on the second ground above stated, because they were executed in violation of the provisions of the several granting acts heretofore mentioned, the case at bar does involve certain Federal questions which it might be found necessary to decide, and on the decision of which the right of the plaintiff to recover would depend. If the plaintiff company fails to maintain its position that the Litchfield agreement, as confirmed by State legislation, operated to divide the grant and to withdraw the lands north of Watab from the reach of the First Division Company, or that the deeds in question were executed in violation of other State laws, then it seems obvious that the court would find itself compelled to consider the Federal questions above suggested,—whether the deeds were rightfully executed under Federal laws, and operated to divest the State of its title to all or any of the lands therein described which lie north of Watab. It is proper to observe in this connection that we are not concerned at present with the merits of the several propositions heretofore stated on which the plaintiff bases its claim that the deeds executed by the Governor were void, and

conveyed no title to the lands situated north of Watab. Whether the construction that is placed on the granting acts by the plaintiff company with a view of impeaching the conveyances is sound or unsound, we need not stop at this point to inquire, because the jurisdiction of the Circuit Court does not depend on that inquiry. If it appears, in any aspect which the case may assume, that the right of recovery may depend upon a construction of those acts, and if the right to recover so far as it turns on the construction of Federal statutes is not merely a colorable claim, but rests upon a reasonable foundation, then a Federal question is involved which is adequate to confer jurisdiction. We entertain no doubt that certain provisions contained in the several acts of Congress relative to the disposal of the lands by the State and territory of Minnesota are of such a nature as to afford a reasonable ground for the contention that the lands in controversy were not conveyed by the Governor of the State in conformity therewith, and that the deeds were for that reason voidable, if not void. We think that the plaintiff company may fairly invoke a construction of these statutes, and that the allegations of the bill are sufficient for that purpose. Nor is it at all material, that the court may not be compelled to construe the acts of Congress in the respects stated, or in any other, for, as we have already shown, its jurisdiction does not depend upon the nature of the question that is ultimately decisive of the plaintiff's right to recover. If a case is commenced originally in the Circuit Court, and, by a fair construction of the complaint, it appears that the plaintiff predicates his right to relief on the meaning or effect of a law of the United States, and the claim is made in good faith, so that there is a real instead of a merely colorable controversy, then jurisdiction over the case exists, even though it may appear that the right to the same relief is asserted on another ground, that does not involve the consideration of a Federal question. In concluding the discussion on this branch of the case, it is proper to add that we do not concur in the view that the case is one of Federal cognizance merely because the title to the lands in controversy is derived from the United States. The bill shows very conclusively that both parties claim under the State of Minnesota, that the title to the State is not challenged, but is conceded to be well founded under the granting acts. The questions at issue all grow out of the manner in which the State dealt with the lands after it acquired the same from the general Government. Nor is the case one in which the parties are asserting rights derived respectively from conflicting land

grants. Under these circumstances it must be conceded, we think, in accordance with the decision in Romie v. Casanova, 91 U. S. 379, that a Federal question is not involved in the case merely because the United States is the ultimate source of title. The jurisdiction of the court must be upheld, however, on the ground heretofore stated.[2]

HANS v. LOUISIANA.

Supreme Court of the United States. 1890.

134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Cir-

2 Only that part of the opinion dealing with the jurisdiction of the federal court is reprinted.

In McChord v. Railway Co., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. ed. 289 (1902), the court said the case must be one "actually and not potentially arising under the constitution. Jurisdiction cannot be invoked for threatened legislative action, or to interfere in any manner with the adoption of such action by state or city."

For a list of cases in which it was determined whether or not a federal question was involved, see 1 Foster Federal Practice (5th Ed.) pp. 58-60.

See also Nueces Valley Town-Site Co. v. M'Adoo, 257 Fed. 143, 146 (1919); State of Ohio v. Cox, 257 Fed. 335, 336-338, 343 (1919); Wayne v. Venable, 260 Fed. 64, 66 (1919).—Ed.

cuit Court, which, as found in the Act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, * * * arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one necessarily involves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana v. Jumel, 107 U. S. 711; Hagood v. Southern, 117 U. S. 52; In re Ayers, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against State officers who professed to act in obedience to those laws. This court held that suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable; and

then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of Chisholm v. Georgia, 2. Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney General Lee, in the case of Hollingsworth v. Virginia, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" Eilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state." * * *

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice IREDELL in his opinion in Chisholm v. Georgia; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. Osborn v. Bank of United States, 9 Wheat. 738; Davis v. Gray, 16 Wall 203; Board of Liquidation v. McComb, 92 U. S. 531; United States v. Lee, 106 U. S. 196; Poindexter v. Greenhow, 109 U. S. 63; Virginia Coupon Cases, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals, conceding that if they had been against either the State or the United States, they could not be maintained. * * *

But besides the presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: "The Circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, * * * arising under the Constitution or laws of the United States, or treaties," etc.—"Concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The State courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the Judiciary Act of 1789, which was before the court in Chisholm v. Georgia, and the majority of the court did not think it was sufficient to limit the jurisdiction of the Circuit Court. Justice IREDELL thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice IREDELL'S views in this regard.

It is not necessary that we should enter upon an examination of

the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and it is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the Legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is

Affirmed.

Mr. Justice Harlan concurring.

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in Chisholm v. Georgia do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of the opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.[1]

HAMMERSTEIN v. LYNE.

District Court, W. D. Missouri, W. D. 1912.

200 Fed. 165.

In equity, suit by Oscar Hammerstein against Felice Lyne in relation to a contract made by them providing that the latter should sing under the management of the former.

It appears that the defendant was born at Slater, in this division and district of Missouri; that she subsequently lived in Kan-

[1] Only a portion of the opinion is reprinted.—Ed.

sas City with her parents; that on or about August 12, 1907, she disposed of all her property and effects, except such as she took with her, and left Kansas City, with her mother, for Paris, France, for the purpose of completing her musical education and entering upon an operatic career; that she remained in Paris three years, revisiting this country in August, 1910, during which time she sang under the management of the complainant in New York and Philadelphia, and made a brief visit to her grandparents in Kansas City; that she returned to Paris, where she remained until the 20th of September of the same year, and then she went to London and took up her residence there, where she still lives, her address being No. 1 Hay Hill, Berkely Square; that she remained there continuously until September 12, 1912, when she sailed for the United States for the purpose of giving the concert in Kansas City referred to in the bill of complaint. On the occasion of her first visit, she signed, at the port of New York, a nonresident's declaration and entry, declaring herself to be a resident of Paris. On her second visit she signed a similar nonresident's declaration and entry, declaring herself to be a resident of England. Her mother has been with her continuously, and her father now resides in Pennsylvania. None of the family have either home or property in the state of Missouri, but have relatives living in Kansas City. The defendant declares that, when she left Kansas City in August, 1907, she did so with the purpose of changing her domicile, and with no intention of returning here to live. On the contrary, it was her intention to take up a residence abroad in the pursuit of her chosen profession; that she first established a residence in Paris, and afterwards her present residence in London, with the intention of remaining there for an indefinite period, and that such should be her principal and permanent residence; that she has not now, and has not had since her departure, any intention of returning to Missouri. She has not, however, taken any steps to alter her status as a national citizen of this country, nor is it her intention so to do. On the contrary, she explicitly asserts that she is, and considers herself to be, a citizen of the United States. Under this state of facts, defendant submits that this court has no jurisdiction over her in this case. The complainant contends that she is still a citizen of the State of Missouri, and a resident of the Western Division of the Western District thereof.

There was a plea to the jurisdiction.[1]

[1] The facts are restated, largely from the syllabus.—Ed.

VAN VALKENBURGH, District Judge. The Constitution of the United States (article 3, § 2), provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

This comprehends and limits the jurisdiction of the National courts. Defining the jurisdiction of the District courts, the Judicial Code (chapter 2, § 24) provides:

"The District courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects."

The jurisdiction of this court must exist, if at all, because the case at bar belongs to one of the classes named, more specifically to "b" or "c" above described. The complainant is admitted to be a citizen of the State of New York. Then, to confer jurisdiction upon this court, in any view, the defendant must be a citizen of some other State, or she must be an alien. It is not and cannot be claimed that she is a citizen of any State other than Missouri.

(1) It is first necessary to inquire whether, upon the testimony before us, the defendant can be held to be a citizen of any state, and in determining this we must remember that the citizenship with which we are now concerned is that contemplated by the judiciary act. Citizenship in this country is a dual one—

National and State—and the distinction between National and State citizenship has been frequently pointed out.

The first section of the fourteenth article of amendment to the Federal Constitution provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Concerning the definition of citizenship therein contained, the Supreme Court of the United States has said:

"The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." Slaughterhouse Cases, 16 Wall. 36, 73, 74, 21 L. Ed. 391.

(2) In Cooper v. Galbraith, No. 3,193, Fed. Cas. 473, Mr. Justice WASHINGTON said:

"Citizenship, when spoken of in the Constitution in reference to the jurisdiction of the courts of the United States, means nothing more than residence. The citizens of each State are entitled to all the privileges and immunities of citizens in the several States; but to give jurisdiction to the courts of the United States, the suit must be between citizens residing in different States, or between a citizen and an alien."

Of course the residence here spoken of means permanent residence *animo manendi*. This appears from his language used in Butler v. Farnsworth, No. 2,240, 4 Fed. Cas. 902, wherein he says:

"In order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile and permanent residence in the State to which he may have removed from another State. Mere residence is *prima facie* evidence of such change, although, when it is explained and shown to have been for temporary purposes, the presumption is destroyed.

Further discussing the question here involved, the learned Justice says:

"With respect to the immunities which the rights of citizenship can confer, the citizen of one State is to be considered as a citizen of each and every other State in the Union. But the privilege of suing in the tribunals of the nation cannot possibly depend upon the fact of general citizenship, because, if it did, the jurisdiction of those tribunals would extend to every case where citizens were parties, since a citizen of Pennsylvania, suing a citizen of the same State, might truly allege that he is himself a citizen of any other State, and that the defendant is a citizen of the State in which the suit is brought. Or every case, in which citizens are parties, might, by the same course of argument be excluded, since, it being equally true that a citizen of New Jersey, who is plaintiff, is also a citizen of Pennsylvania, the Pennsylvania defendant might plead that the plaintiff and defendant are citizens of the same State. It is plain, therefore, that citizenship, in relation to the Federal judiciary, cannot be that which has just been referred to, but must be of that kind which identifies the party with some particular State, of which he is a member. The theory of this provision in the Constitution is the danger of partiality in the State tribunals, where the suit is between a member of the political family, where the suit is instituted, and a stranger. Citizens, in reference to Federal jurisdiction, are mentioned as in opposition to each other. It is a citizen of one State, and a citizen of another State in which the suit is brought, which can never be explained by a general citizenship, which confounds all distinction, and admits of no opposition. The only rational construction of the Constitution in relation to Federal jurisdiction, is to limit it to cases where the suit is between the resident citizens of different States, or where an alien is a party."

Still further developing this idea, Mr. Justice STORY, in Case v. Clarke, No. 2,490, 5 Fed. Cas. 254, said:

"To constitute a person a citizen of a State, so as to sue in the courts of the United States, he must have a domicile in such State."

In Marks v. Marks (C. C.) 75 Fed. 321, 322, the rule is thus stated:

"To constitute citizenship of a State in relation to the Judiciary Act requires, first, residence within such State; and, second, an intention that such residence shall be permanent. In this sense, state citizenship means the same thing as domicile in its general acceptation. The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied

by an intention of remaining, which constitutes domicile. The distinction between domicile and mere residence may be shortly put as that between residence *animo manendi* and residence *animo revertendi.*"

In Sharon v. Hill (C. C.) 26 Fed. 337, 342, it was said:

"Citizenship is a status or condition, and is the result of both act and intent. * * * The residence and the intent must coexist and correspond; and although, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown; and when the question of citizenship turns on the intention with which a person has resided in a particular State, his own testimony, under ordinary circumstances, is entitled to great weight on the point."

(3) What constitutes citizenship in another State, in the sense of the Constitution and Judiciary Act, with reference to the jurisdiction of the Federal courts was discussed by Circuit Justice MARSHALL in Prentiss v. Barton, No. 11,384, 19 Fed. Cas. 1276. He said:

"In the sense of the Constitution and of the Judiciary Act, he who is incorporated into the body of the State, by permanent residence therein, so as to become a member of it, must be a citizen of that State, although born in another. Or, to use the phrase more familiar in the books, a citizen of the United States must be a citizen of that State in which his domicile is placed."

He points out that State citizenship cannot depend entirely upon birth; that the rights so conferred, as respects suits in the Courts of the United States, may be changed by a change of residence.

In Prentiss v. Brennan, No. 11,385, 19 Fed. Cas. 1278, Mr. Justice NELSON says:

"A person may be a citizen of the United States, and not a citizen of any particular State. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed or permanent residence or domicile in a State is essential to the character of citizenship that will bring the case within the jurisdiction of the Federal courts."

It is apparent that State citizenship, under our system and as used in the Constitution and Judiciary Act, is essentially different from National citizenship. The latter is defined to be the relation of allegiance and protection between individuals and their country. It is the antithesis of alienage, and involves a National

right or condition. As was said in Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583:

"It pertains to the confederated sovereignty—the United States —and not to the individual States."

A citizen of the United States owes his primary and highest allegiance to the general Government, and not to his particular State. On the other hand, State citizenship is the practical equivalent of domicile.

"That place is properly the domicile of a person in which he has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home." 14 Cyc. 833.

Generally speaking, and especially with reference to the Judiciary Act, it must involve National citizenship. Although a State may, by its Constitution and laws, confer certain privileges of citizenship on foreign subjects, it cannot make them citizens within the meaning of this act. City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576. Nevertheless, such state citizenship or domicile is not at all essential to National citizenship.

(4) It would appear conclusively from the facts presented, from the uniform views expressed by the courts, and from the definitions universally accepted, that the defendant in this case has established a domicile in London, England. She lives there. She declares it to be her home, and that it is her intention to remain there indefinitely. She has abandoned her former home in Missouri for an indefinite and uncertain period, with no present intention of returning. Her present visit is a temporary one. It is her purpose to return to England, and she would have executed that purpose before this, had it not been for the pendency of this suit. Ennis et al. v. Smith et al., 14 How. 400, 423, 15 L. Ed. 472; Morris v. Gilmer, 129 U. S. 315, 328, 9 Sup. Ct. 289, 32 L. Ed. 690; 14 Cyc. 833. Under such circumstances, she is not and cannot be a citizen of Missouri within the meaning of the Judiciary Act conferring jurisdiction upon the Federal courts of controversies between citizens of different States.

(5) Is she, then, a citizen of the United States, or is she an alien? Because, if the latter, she can be sued in this court, if found in this jurisdiction, by the complainant, who is a citizen of the State of New York. It being admitted that she is by birth a citizen of the United States, the burden is upon the complainant to show that she has renounced or otherwise abandoned or lost that

citizenship. She herself asserts it. What must we conclude from the facts appearing in testimony?

There has been no act of naturalization, nor any step in that direction. If she has lost her citizenship at all, it must be through some act of expatriation. What is essential to bring about that result? It will hardly be contended that mere change of residence, even with intention never to return, can have that effect. MILLER, Circuit Justice, in Lanz v. Randall, No. 8,080, 14 Fed. Cas. 113.

"In order that expatriation may be considered to have taken place, there must be an actual removal from the country of which the individual is then a citizen or subject, made voluntarily by a person of full age and under no disability, as the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to throw off the former allegiance and become the citizen or subject of a foreign power." 14 Cyc. 145, 146.

In State v. Adams, 45 Iowa 99, 24 Am. Rep. 760, it was held that:

"Mere removal from the United States and residence in a foreign country for a period of years does not operate as a withdrawal of citizenship, where it is not shown that the individual intended to or did become a foreign citizen."

See also, Ludlam v. Ludlam, 26 N. Y. 356, 84 Am. Dec. 193.

It may be conceded that a citizen may reside abroad under such circumstances as to forfeit his right to the protection of the sovereignty to which he owes or professes allegiance; but this is not tantamount to a loss of his former citizenship, and certainly not within the meaning of the Judiciary Act. The purpose to effect this must be manifested by some unequivocal act on the part of the citizen seeking or suffering expatriation. Comitis v. Parkerson (C. C.) 56 Fed. 557, 22 L. R. A. 148. We have seen that citizens and subjects of one country may acquire a domicile in a foreign country without such forfeiture. There has been in this case no such act, coupled with intention, as would operate to convert this defendant into an alien within the meaning of the law now under consideration.

It follows that, inasmuch as Miss Lyne is neither a citizen of a State, nor an alien, within the meaning of the Judiciary Act, this court is without original jurisdiction to entertain this action. That this may have the practical effect of denying complainant the right to litigate the difference between himself and the defendant in any Federal Court cannot alter the situation.

"As has been so often said by the Supreme Court, construing the present Judiciary Act, 'the whole purport and effect of that act was not to enlarge, but to restrict and distribute, jurisdiction.' Shaw v. Mining Co., 145 U. S. 444 (12 Sup. Ct. 935, 36 L. Ed. 768). And, as said before, Congress under constitutional power created all Federal courts inferior to the Supreme Court, and conferred on such courts their jurisdiction and power. Within the constitutional limitation it may grant the exercise to such courts of just so much or so little judicial power as in its wisdom it may deem fit." Mahopoulus v. Chicago, R. I. & P. Ry. Co. (C. C.) 167 Fed. 172.

It will not be urged that citizens of the United States have the right to prosecute against other citizens in any jurisdiction they may find convenient. If Miss Lyne were conceded to be a citizen of Missouri, and studiously avoiding either New York or Missouri, had elected to give concerts in Chicago, in the Northern District of Illinois, would it be contended that, because of diverse citizenship, the complainant could have invoked the jurisdiction of the Federal courts in the latter district? Obviously not. This is because the Federal courts, in this respect, are courts of a limited and prescribed jurisdiction.

Here, inasmuch as the jurisdiction is entirely wanting, no act of the parties could operate to confer it The conclusion here reached necessarily disposes of all other contentions of complainant made in argument and brief.

The plea to the jurisdiction must be sustained; and it is so ordered.[2]

RAILWAY COMPANY v. WHITTON.

Supreme Court of the United States. 1871.

80 U. S. (13 Wallace) 270, 20 L. Ed. 571.

MR. JUSTICE FIELD, having stated the case, delivered the opinion of the court as follows:

2 "Domicile" and "citizenship" are not always synonymous. Pannill v. Roanoke Times Co., 252 Fed. 910, 913 (1918).

A wife may obtain a different domicile from that of her husband for the purpose of bringing an action for damages in a federal court. Williamson v. Osenton, 232 U. S. 619, 34 S. Ct. 442, 58 L. ed. 758 (1914). Compare Nichols v. Nichols, 92 Fed. 1 (1899).

A minor, who has reached years of discretion and has no parents, grandparents, or statutory guardian, may establish a domicile anywhere for the purpose of federal jurisdiction. Bjornquist v. Boston & A. R. Co., 250 Fed. 929, 931-933, 163 C. C. A. 179, 181-183 (1918).—Ed.

The jurisdiction of the action by the Federal Court is denied on three grounds; the character of the parties as supposed citizens of the same State; the limitation to the State court of the remedy given by the statute of Wisconsin; and the alleged invalidity of the act of Congress of March 2d, 1867, under which the removal from the State court was made.

First, as to the character of the parties. The plaintiff is a citizen of the State of Illinois and the defendant is a corporation created under the laws of Wisconsin. Although a corporation, being an artificial body created by legislative power is not a citizen within several provisions of the Constitution; yet it has been held, and that must now be regarded as settled law, that, where rights of action are to be enforced, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different States.[1] The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same State with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of The Ohio and Mississippi Railroad v. Wheeler.[2] In that case the declaration averred that the plaintiffs were a corporation created by the laws of the States of Indiana and Ohio, and that the defendant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the State which created it, and therefore that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against a citizen of the latter State, and of course could not be maintained in a court of the United States where jurisdiction of the case depended upon the citizenship of the parties. The court also observed that though a corporation by the name and style

1 Paul v. Virginia, 8 Wallace, 177.
2 1 Black, 286.

of the plaintiffs in that case appeared to have been chartered by the States of Ohio and Indiana, clothed with the same capacities and powers, and intended to accomplish the same objects, and was spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States, yet it had no legal existence in either State except by the law of that State; that neither State could confer on it a corporate existence in the other nor add to or diminish the powers to be there exercised, and that though composed of and representing under the corporate name the same natural persons, its legal entity, which existed by force of law, could have no existence beyond the territory of the State or sovereignty which brought it into life and endowed it with its faculties and powers.

The correctness of this view is also confirmed by the recent decision of this court in the case of The Railroad Company v. Harris.[3] In that case a Maryland railroad corporation was empowered by the Legislature of Virginia to construct its road through that State, and by an act of Congress to extend a lateral road into the District of Columbia. By the act of Virginia the company was granted the same rights and privileges in that State which it possessed in Maryland, and it was made subject to similar pains, penalties, and obligations. By the act of Congress the company was authorized to exercise in the District of Columbia the same powers, rights, and privileges in the extension and construction of the road, as in the construction and extension of any railroad in Maryland, and was granted the same rights, benefits, and immunities in the use of the road which were provided in its charter, except the right to construct from its road another lateral road. And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that State and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations and made it subject to suit in Virginia and in the District. The corporation, said the court, "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it does business there it will be presumed to have assented, and will be bound accordingly. For the purposes of Federal jurisdiction

[3] 12 Wallace, 65.

it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted."[4]

HEPBURN AND DUNDAS v. ELLZEY.

Supreme Court of the United States. 1805.

6 U. S. (2 Cranch) 445, 2 L. Ed. 332.

MARSHALL, Ch. J. delivered the opinion of the court.

The question in this case is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.

This depends on the act of Congress describing the jurisdiction of that court. That act gives jurisdiction to the Circuit courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, therefore, it must appear that Columbia is a State.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, "a State" according to the definitions of writers on general law.

This is true. But as the act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one Representative.

The Senate of the United States shall be composed of two Senators from each State.

Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of Senators and Representatives.

[4] The facts are omitted, and only a portion of the opinion is reprinted. Compare Baldwin v. Chicago & N. W. Ry. Co., 86 Fed. 167 (1898).—Ed.

These clauses show that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the Constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them. But this is a subject for legislative, not for judicial, consideration.

The opinion to be certified to the Circuit Court is, that that court has no jurisdiction in the case.[1]

THE CORPORATION OF NEW ORLEANS v. WINTER.

Supreme Court of the United States. 1816.

14 U. S. (1 Wheaton) 91, 4 L. Ed. 44.

Error from the District Court for the District of Louisiana. The defendants in error commenced their suit in the said court, to recover the possession and property of certain lands in the City of New Orleans; claiming title as the heirs of Elisha Winter, deceased, under an alleged grant from the Spanish Government, in 1791; which lands, it was stated, were afterwards reclaimed by the Baron de Carondelet, Governor of the Province of Louisiana, for the use of fortifications. One of the parties, petitioners in the court below, was described in the record as a citizen of the State of Kentucky; and the other, as a citizen of the Mississippi Territory. The petitioners recovered a judgment in the court below, from which a writ of error was brought.

[1] The facts are omitted.—Ed

MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The proceedings of the court, therefore, is arrested in limine, by a question respecting its jurisdiction. In the case of Hepburn & Dundas v. Ellzey, this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained.

It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a State, in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of Strawbridge et al. v. Curtis et al., it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The Circuit Court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.[1]

[1] In the case of Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535 (1902), Sanborn, Circuit Judge, said, "A national court has no jurisdiction of a suit or controversy between a citizen of a state and a citizen of a territory, and the joinder or association of citizens of states with the respective parties to such a suit or controversy does not remove the fatal objection." Compare Ulman v. Laeger's Adm'r, 155 Fed. 1011, 1018 (1907).

A citizen of one state may sue the citizen of another state and a subject of a foreign power in a federal court. Ryan v. Ohmer, 233 Fed. 165, 166-167 (1916).

A state is not a citizen. Deseret Water, Oil & Irr. Co. v. State of California, 202 Fed. 498, 500, 120 C. C. A. 641, 643 (1913).—Ed.

BETANCOURT v. MUTUAL RESERVE FUND LIFE ASS'N.

Circuit Court, S. D. New York. 1900.

101 Fed. 305.

Lacombe, Circuit Judge.—The action is upon an insurance policy, and is brought in the Federal Court by reason of diversity of citizenship. The act of 1887 gives the Circuit Court jurisdiction of a controversy "between citizens of a State and foreign States, citizens or subjects." The complaint avers that the defendant is a domestic corporation organized under, and existing by virtue of, the laws of the State of New York, and having its principal office in the City of New York. This is a sufficient averment that the defendant is a "citizen of a State," to wit, New York. The complaint further alleges that the plaintiff is, and at all the times hereinafter mentioned has been, a resident and inhabitant of the City of Matanzas, in the Island of Cuba, and a subject and citizen of Cuba. The demurrer asserts that the court has no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action. Upon the hearing no argument was made or proposition advanced in support of the second ground of demurrer. The entire reliance of the demurrant appears to be upon the proposition that there is not the diversity of citizenship which the statute requires, by reason of the fact that the plaintiff is a citizen of Cuba. Counsel does not maintain that plaintiff was not a foreign citizen before the breaking out of the war with Spain, nor that he ceased to be a foreign citizen when the joint resolution of April 20, 1898, was passed, declaring that the people of the Island of Cuba "are and of right ought to be free and independent," nor that the military occupation of Cuba by the forces of the United States in any way changed his status. It is contended, however, that in some way or other the treaty with Spain of December 10, 1898, did, from the date of its ratification, remove him from the category of "foreign citizens or subjects." By the first article of the treaty, Spain relinquishes all claim of sovereignty over and title to Cuba, and as the Island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property. The fourteenth article

further states that it is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof. The ninth article provides for Spanish subjects, natives of the Peninsula, who remain in the territory covered by the treaty. If they make a certain declaration within a limited time, they may preserve their allegiance to the crown of Spain, and in default of such declaration they are to be held to have renounced such allegiance, and to have adopted "the nationality of the territory in which they may reside." There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen. Even the brief memorandum of opinion in Stuart v. City of Easton, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341, gives no support to demurrant's contention. One may be puzzled to determine upon what theory it was held in that case that a "citizen of London, England," is not a "foreign citizen;" but assuming, as suggested, that it is because London is not a free and independent community, but owes allegiance to the British crown, the decision has no application to the case at bar, since the political branch of this Government has found, as a political fact, that the people of the Island of Cuba "are free and independent." The demurrer is therefore overruled, and plaintiff may take judgment, unless defendant file an answer within 10 days after the entry of the order disposing of this motion.[1]

STRAWBRIDGE et al. v. CURTIS et al.

Supreme Court of the United States. 1806.

7 U. S. (3 Cranch) 267, 2 L. Ed. 435.

This was an appeal from a decree of the Circuit Court, for the District of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction.

Some of the complainants were alleged to be citizens of the State of Massachusetts. The defendants were also stated to be citizens of the same State, excepting Curtis, who was averred to be a citizen of the State of Vermont, and upon whom the subpoena was served in that State.

[1] An Indian residing within the United States, and who is a member of an Indian tribe living therein, is not a "foreign citizen or subject." Karahoo v. Adams, 14 Fed. Cas. No. 7,614, p. 134, 1 Dillon, 344 (1870).—Ed.

Marshall, Ch. J., delivered the opinion of the court.

The court has considered this case, and is of the opinion that the jurisdiction cannot be supported.

The words of the act of Congress are, "where an alien is a party; or the suit is between a citizen of a State where the suit is brought, and a citizen of another State."

The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.[1]

DUNN et al. v. CLARKE et al.

Supreme Court of the United States. 1834.

33 U. S. (8 Peters) 1, 8 L. Ed. 845.

Mr. Justice McLean delivered the opinion of the court.

This suit was brought into this court, by an appeal from the decree of the Circuit Court of the United States, for the District of Ohio.

The complainants in the court below filed their bill praying for an injunction to a judgment recovered against them in an action of ejectment, and to obtain a decree for a conveyance of the land in controversy. All the complainants are residents of the State of Ohio, and so are the defendants.

The judgment at law was obtained by Graham, a citizen of Vir-

[1] As to the effect upon the problem presented in the principal case of joining trustees and married women as defendants, see respectively, Dunn v. Waggoner, 11 Tenn. (3 Yerger) 59 (1832); Thompson v. Stalmann, 139 Fed. 93 (1905).

"If the jurisdiction of the court could be ousted by making all the parties concerned in interest plaintiffs, those who are citizens of the same state with the real defendants may refuse to join in the suit, and may be made defendants." Wisner v. Ogden, 30 Fed. Cas. No. 17,914, p. 388, 394, 4 Wash. C. C. 631, 642 (1827).—Ed.

ginia, but who has since deceased; and the defendant, Walter Dunn, holds the land recovered, in trust, under the will of Graham.

On this state of facts a question is raised, whether this court have jurisdiction of the cause. This question seems not to have been made in the Circuit Court.

No doubt is entertained by the court, that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law against Dunn. He is the representative of Graham; and although he is a citizen of Ohio, yet this fact, under the circumstances, will not deprive this court of an equitable control over the judgment. But beyond this, the decree of this court cannot extend.

Of the action at law, the Circuit Court has jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the Circuit Court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing, as against him. The injunction bill is not considered an original bill between the same parties, as at law; but, if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the Circuit Court must depend upon the citizenship of the parties.

In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the Circuit Court. But, as there appear to be matters of equity in the case, which may be investigated by a State court, this court think it would be reasonable and just to stay all proceedings on the judgment, until the complainants shall have time to seek relief from a State court. And the court direct that all proceedings be thus stayed, and that the decree of the Circuit Court be modified so as to conform to this view of the case.[1]

[1] The facts and part of the opinion are omitted.

For further cases involving representative parties, see McNutt v. Bland, 43 U. S. (2 Howard) 9, 13-14, 11 L. Ed. 159, 161 (1844) governor; Coal Company v. Blatchford, 78 U. S. (11 Wallace) 172, 175, 20 L. Ed. 179, 180 (1870) executors and trustees; Rice v. Houston, 80 U. S. (13 Wallace) 66, 67, 20 L. Ed. 484 (1871) administrator; Mexican Central Railway Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245 (1903) guardian of minor; Blumenthal v. Craig, 81 Fed. 320, 321, 26 C. C. A. 427, 428-429 (1897) guardian of minor; Wiggins v. Bethune, 29 Fed. 51, 52 (1886) guardian of one non compos mentis.—Ed.

OMAHA HORSE RY. CO. v. CABLE TRAM-WAY CO. OF OMAHA.

Circuit Court, D. Nebraska. 1888.

33 Fed. 689.

Brewer, J.—The case is now submitted on demurrers to supplemental bill and amendments thereto. A brief review of the past litigation is important. The original bill was filed by the complainant, a corporation chartered by the Legislature of the Territory of Nebraska, and given an exclusive franchise for the building and operating of a horse-railroad in the City of Omaha for the term of 50 years. The defendant is also a corporation, organized under the laws of the State of Nebraska, and having received, as was claimed, permission from the City of Omaha, was proceeding to construct a cable tram-way in its streets. The bill sought to enjoin the defendant from prosecuting its work, on the ground that such cable tram-way was an infringement of the exclusive franchise given to complainant, which exclusive franchise the State of Nebraska was restrained by the Federal Constitution from interfering with in any way, directly or indirectly. Upon the hearing of the case I ruled that the complainant's exclusive franchise was limited to a mere horse-railway, and did not include all manner of street-railway travel, and therefore that the cable tram-way was no invasion of its exclusive franchise.

It was strenuously insisted by the defendant that, having ruled on the Federal question against the complainant, the only proper decree was one dismissing the bill; but, under the authority of Railroad Co. v. Mississippi, 102 U. S. 135, and cases cited therein, I ruled that the existence of a Federal question gave to this court jurisdiction of the entire cause, and that it was its duty to hear and determine all other questions existing in the case between the parties. The Constitution of the State of Nebraska prohibits both the damaging and the taking of private property for public uses without compensation, and it seemed to me, under the facts as disclosed by the testimony, that while the complainant's exclusive franchise was not invaded, its property rights were damaged by the building of the proposed cable tram-way. I therefore directed that the matter of the damages to its property be referred to a commission. That commission examined the question, and reported in favor of the complainant a certain amount. On ex-

ceptions to their report, and a motion to confirm it, a second lengthy hearing was had. After reducing the amount allowed by the commissioners, I sustained their report, and directed a final decree in favor of the complainant for such amount. No such decree has been in fact entered, but, after the proceedings above named, complainant obtained leave to file a supplemental bill, and subsequently certain amendments thereto. The matters presented in these pleadings are those now challenged by demurrer and before me for consideration.

There are three matters presented: First, it is averred that the supposed permission to the defendant to occupy the streets of Omaha with its cable tram-way was never in fact legally given, and that its entry upon the streets was a mere trespass; second, there is presented a question about the occupancy of a street heretofore occupied by neither party; and, third, defects in the construction of certain crossings of complainant's track by defendant's tram-way are alleged. Several grounds for demurrer were discussed on the argument. One only will be noticed, as that is deemed fatal.

It is doubtless true, as a general proposition, that, at any time before final decree, the court may permit the bringing in of matters germane to the original controversy which have accrued since the filing of the original pleadings, in order to make a decision of the entire controversy between the parties. But is not this rule largely affected by the question whether the court is one of general or limited jurisdiction? Can it convey the jurisdiction to matters over which, but for the rule, there would be none? The parties here are both citizens of Nebraska, and ordinary disputes between them must be settled by the State courts, and the Federal courts can only take cognizance of a controversy between them in which there is a Federal question. Now, if it be true, as I think it is, and have so held, that the existence of a Federal question in the case as presented gives the court jurisdiction to hear and determine all of the pending questions, can it be true that it also gives the court power to continue the case, and draw to itself all subsequent disputes, even if connected with and germane to the original controversy? See to what that, in this case, might lead. The complainant's charter has 30 years still to run. Some of the streets are occupied by the tracks of each party, and, as the city grows, more will be occupied by each, and doubtless, in some cases, the same street by both. Crossings will, in the nature of things, have to be made. Perhaps there will be negligence in the con-

struction of these crossings, perhaps negligence in the management of cars of each as they approach such crossings. All such controversies naturally and properly belong in the State courts. Can it be that, because in the first instance there was a Federal question growing out of the alleged invasion of an exclusive franchise, the Federal courts can, by supplemental bills, take cognizance of these continuing and repeating controversies? It will be borne in mind that there has not been constant unanimity on the part of the judges of the Supreme Court on the question whether the existence of a Federal question gives the Federal Court power to hear and determine all the questions in the case, and surely, if that be a matter of doubt, it would be unwise to attempt to carry the jurisdiction of the Federal Court a step further. It is not the design of the Federal Constitution, or the purpose of Congress, to make the Federal Court arbitrators of disputes between citizens of the same State. To their own courts such citizens must look, and the repeated monitions of the Supreme (Court?) caution the trial courts not to take jurisdiction of cases of which their jurisdiction is doubtful. Believing that, unless the line be drawn so as to give jurisdiction of such questions only as exist in the case at the time it is submitted, there can be no definite line placed, and the door will be opened to an indefinite exercise of jurisdiction by the Federal courts over matters of purely local nature, I feel constrained to sustain the demurrer. The matters presented by these subsequent bills and amendments are purely local in their nature; of them, by themselves, confessedly the Federal courts would have no jurisdiction. When they were brought into the case there remained no Federal question in it for determination, and there being no Federal question, there is nothing upon which to hang the jurisdiction of this court. The demurrer will be sustained, and the case will be passed to decree upon the original pleadings and the report of the commissioners, as modified.[1]

[1] In the following cases the court held that the proceeding involved was ancillary in its nature: Clarke v. Mathewson, 37 U. S. (12 Peters) 164, 9 L. Ed. 1041 (1838) bill of revivor; Railroad Companies v. Chamberlain, 73 U. S. (6 Wallace) 748, 18 L. Ed. 859 (1867) bill to set aside judgment and lease; Reilly v. Golding, 77 U. S. (10 Wallace) 56, 56-57, 19 L. Ed. 858 (1869) proceeding in attachment suit; Atwood v. The Portland Co., 10 Fed. 283, 283 (1880) injunction; Pullman's Palace-Car Co. v. Washburn, 66 Fed. 790, 792-794 (1895) writ of scire facias; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 645 (1897) mortgage foreclosure suit; Jenks v. Brewster, 96 Fed. 625, 625-626 (1899), suit to obtain a construction and enforcement of decree of the same court; Vallery v. Denver & R. G. R. Co., 236 Fed. 176, 177-179, 149 C. C. A. 366, 367-369 (1916)

POSTAL TELEGRAPH CABLE CO. v. ALABAMA.

Supreme Court of the United States. 1894.

155 U. S. 482, 15 S. Ct. 192, 39 L. Ed. 231.

This was a case in which the State of Alabama was suing The Postal Telegraph Cable Co., a New York corporation, in the Circuit Court of the State of Alabama to recover taxes and penalties. Later there was a removal to the Circuit Court of the United States. Plaintiff obtained judgment in that court and the defendant sued out a writ of error bringing the case before the Supreme Court of the United States.[1]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

A State is not a citizen. And, under the Judiciary acts of the United States, it is well settled that a suit between a State and a citizen or corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States. Ames v. Kansas, 111 U. S. 449; Stone v. South Carolina, 117 U. S. 430; Germania Ins. Co. v. Wisconsin, 119 U. S. 473.[2]

MORRIS v. GILMER.

Supreme Court of the United States. 1888.

129 U. S. 315, 9 S. Ct. 289, 32 L. Ed. 690.

The court stated the case as follows:

The first assignment of error relates to the action of the Circuit Court in overruling a motion to dismiss this suit, as one not really

receivership suit; Brown v. Crawford, 252 Fed. 248, 255-256 (1918) cross-bill. But compare Cleveland Engineering Co. v. Galion D. M. Truck Co., 243 Fed. 405, 407 (1917) counterclaim.—Ed.

1 The facts are restated.—Ed.

2 Only a portion of the opinion is reprinted.—Ed.

and substantially involving a dispute or controversy properly within its jurisdiction.

On the 7th of July, 1884, the present appellee, James N. Gilmer, who was then, and during all his previous life had been, a citizen of Alabama, instituted a suit in equity, in one of the Chancery courts of the State, against Josiah Morris, individually, and against Josiah Morris and F. M. Billing as composing the firm of Josiah Morris & Co., citizens of Alabama. Its object was to obtain a decree declaring that the transfer, by the plaintiff to Morris, of sixty shares of the capital stock of the Elyton Land Company, an Alabama corporation, was made in trust and as collateral security for the payment of a debt due from the plaintiff to Josiah Morris & Co.; ordering an accounting in respect to the amount of that debt, the value of the stock, and the dividends thereon received by Morris; and directing him upon the payment of the debt and interest, or so much thereof as appeared to be unpaid, to transfer sixty shares of the stock to the plaintiff, and pay over any dividends received in excess of the debt due from the latter.

Besides putting in issue all the material averments of the bill, the answer relied upon laches and the Statute of Limitations in bar of the suit. The cause went to a hearing, upon pleadings and proofs, and, on the 29th of April, 1885, a final decree was rendered dismissing the suit; the Chancery Court holding that the claim was barred by the Statute of Limitations. Upon appeal, the decree was affirmed by the Supreme Court of Alabama, on the 27th day of January, 1886. That court, as appears from the opinion of its Chief Justice, refused to modify the decree, so as to make it a dismissal without prejudice to another suit. Gilmer v. Morris, 80 Alabama 78.

The present suit was instituted, September 20, 1886, in the Circuit Court of the United States by Gilmer, claiming to be a citizen of Tennessee, against Morris and Billing. It relates to the same shares of stock, and the relief asked is that Morris be decreed to account for and pay over to the plaintiff all dividends paid after it came to the defendant's hands, (after deducting Gilmer's indebtedness to Morris or to Morris & Co.,) and to transfer the sixty shares of stock to the plaintiff. The defendants filed a plea setting up the final decree in the State court in bar of the present suit. That plea having been overruled, Gilmer v. Morris, 30 Fed. Rep. 476, they separately answered; Billing disclaiming any interest in the stock, or in the dividends thereon. The plaintiff filed a replication. Subsequently, December 16, 1887, the defendant Morris filed

in the cause the affidavit of A. S. Gerald to the effect that, in a conversation held by him with the plaintiff on or about November 14, 1887, the latter informed him "that he had returned to the city of Montgomery to reside permanently, and had been living here with that intent some time previous to said conversation;" and also his own affidavit to the effect that he had been informed and believed that the plaintiff returned to the city of Montgomery "some time in the latter part of May or early part of June, 1887, with the purpose and intent of permanently residing in the State of Alabama, and has continuously resided in said State of Alabama ever since said time." On the 17th day of November, 1887, before the final hearing of the cause, the defendants, with leave of court, filed a written motion for the dismissal of the suit upon the ground that it did not really and substantially involve a controversy within the jurisdiction of the Circuit Court; basing his motion upon the above affidavits of Gerald and Morris, and upon the depositions of the plaintiff, and of his father, F. M. Gilmer, taken in this cause in behalf of the plaintiff.

Upon consideration of said affidavits and depositions, and after argument by counsel for the respective parties, the motion to dismiss was denied. The cause subsequently went to a final decree giving the plaintiff the relief asked. Gilmer v. Morris, 35 Fed. Rep. 682.[1]

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

It is unnecessary to decide whether the Circuit Court erred in overruling the plea of former adjudication, or in rendering the decree appealed from; for we are of opinion that the motion to dismiss the suit, as one not really involving a controversy within its jurisdiction, should have been sustained. It is provided by the fifth section of the act of March 3, 1876 (18 Stat. 472), determining the jurisdiction of the Circuit Courts of the United States, that if in any suit commenced in one of such courts "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively

1 The facts are abbreviated.—Ed.

made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The case presents no question of a Federal nature, and the jurisdiction of the Circuit Court was invoked solely upon the ground that the plaintiff was a citizen of Tennessee, and the defendants citizens of Alabama. But if the plaintiff, who was a citizen of Alabama when the suit in the State court was determined, had not become, in fact, a citizen of Tennessee when the present suit was instituted, then, clearly, the controversy between him and the defendants was not one of which the Circuit Court could properly take cognizance; in which case, it became the duty of that court to dismiss it. It is true, that by the words of the statute, this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, Coldwater &c. Railway v. Swan, 111 U. S. 379, 382, "which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it." To the same effect are King Bridge Co. v. Otoe County, 120 U. S. 225; Grace v. American Central Insurance Co., 109 U. S. 278, 283; Blacklock v. Small, 127 U. S. 96, 105, and other cases. These were cases in which the record did not affirmatively show the citizenship of the parties, the Circuit Court being without jurisdiction in either of them unless the parties were citizens of different States. But the above rule is equally applicable in a case in which the

averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue. While under the Judiciary Act of 1789, an issue as to the fact of citizenship could only be made a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the Circuit Court the duty of dismissing a suit, if it appears at any time after it is brought and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. Williams v. Nottawa, 104 U. S. 209, 211; Farmington v. Pillsbury, 114 U. S. 138, 143; Little v. Giles, 118 U. S. 596, 602. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal.

It is contended that the defendant precluded himself from raising the question of jurisdiction, by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law. In support of this position Hartog v. Memory, 116 U. S. 588, is cited. We have already seen that this court must, upon its own motion, guard against any invasion of the jurisdiction of the Circuit Court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the Circuit Court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits. Metcalf v. Watertown, 128 U. S. 586.

Nor does the case of Hartog v. Memory sustain the position taken by the defendant; for it was there said that "if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition." In that case, the citizenship of the parties was properly set out in the pleadings, and the case was submitted to the jury without any question being raised as to want of jurisdiction, and without the attention of the court being drawn to certain statements inci-

dentally made in the deposition of the defendant against whom the verdict was rendered. After verdict, the latter moved for a new trial, raising upon that motion, for the first time, the question of jurisdiction. The court summarily dismissed the action, upon the ground, solely, of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence upon the question of jurisdiction. The failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was, itself, sufficient to justify a reversal of the order dismissing the action, and what was said that was irrelevant to the determination of that question was unnecessary to the decision, and cannot be regarded as authoritative. The court certainly did not intend in that case to modify or relax the rule announced in previous well-considered cases. In the case before us the question was formally raised, during the progress of the cause, by written motion, of which the plaintiff had due notice, and to which he appeared and objected. So that there can be no question as to any want of opportunity for him to be heard, and to produce evidence in opposition to the motion to dismiss.

We are thus brought to the question whether the plaintiff was entitled to sue in the Circuit Court. Was he, at the commencement of this suit, a citizen of Tennessee? It is true, as contended by the defendant, that a citizen of the United States can instantly transfer his citizenship from one State to another, Cooper v. Galbraith, 3 Wash. C. C. 546, 554, and that his right to sue in the courts of the United States is none the less because his change of domicile was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a Federal Court. As said by Mr. Justice Story, in Briggs v. French, 2 Sumner 251, 256, "if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional and legal consequence, not to be impeached by the motive of his removal." Manhattan Ins. Co. v. Broughton, 109 U. S. 121, 125; Jones v. League, 18 How. 76, 81. There must be an actual, not pretended, change of domicil; in other words, the removal must be "a real one," *animo manendi*, and not merely ostensible." Case v. Clarke, 5 Mason 70. The intention and the act must concur in order to effect such a change of domicil as constitutes a change of citizenship. In Ennis v. Smith, 14 How. 400, 423, it was said that "a removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it," and that while it was difficult to lay down any rule under

which every instance of residence could be brought which may make a domicil of choice, "there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence."

Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a domicil or settled home in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal Court to determine his new suit. He was, therefore, a mere sojourner in the former State when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in Butler v. Farnsworth, 4 Wash. C. C. 101, 103, where Mr. Justice WASHINGTON said: "If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not a bona fide intention of changing his domicil, however frequent and public his declarations to the contrary have been made."

The decree is reversed, with costs to the appellant in this court, and the cause remanded, with a direction to dismiss the suit without costs in the court below.[2]

REESE v. ZINN.

Circuit Court, D. West Virginia. 1900.

103 Fed. 97.

JACKSON, District Judge. This case is submitted, first, upon the defendant's plea to the jurisdiction of this court, and assigns two

2 In the following cases there was held to be no change of citizenship: Caldwell v. Firth, 91 Fed. 177, 184-185, 33 C. C. A. 439, 446-447 (1898); Harton v. Howley, 155 Fed. 491 (1907); Davis v. Dixon, 184 Fed. 509 (1910); Sullivan v. Lloyd, 213 Fed. 275 (1914); Simpson v. Phillipsdale Paper Mill Co., 223 Fed. 661, 662-663 (1915). But see Wiemer v. Louisville Water Co., 130 Fed. 244 (1903).—Ed.

reasons why the court should not entertain the jurisdiction: First, that A. L. Hill and A. J. Hill, who are made defendants to this bill, are improperly joined, and should be made plaintiffs, as no relief is asked against them in said bill, they being citizens and residents of the same State as the defendants; second, that the amount in controversy does not exceed the sum of $2,000, exclusive of interest and costs.

As to the first ground, it is apparent, from both the bill and answer in this case, that A. L. Hill and A. J. Hill are really not necessary parties to this action, and are merely formal parties. There is no relief sought against them. It is well settled that formal parties can be omitted or transposed in the pleadings, or they may be joined plaintiffs or defendants, without ousting the jurisdiction of the court. Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. Ed. 651; Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Railroad Co. v. Ketchum, 101 U. S. 289, 25 L. Ed. 932; Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963; Harter v. Kernochan, 103 U. S. 562, 26 L. Ed. 411. There are numerous decisions, subsequent to the cases cited, which sustain the same principle. For this reason, the court overrules the plea in abatement in this case.[1]

COMPTON v. JESUP.

Circuit Court of Appeals, Sixth Circuit. 1895.

68 Fed. 263, 15 C. C. A. 397.

In 1884 the Central Trust Company, a citizen of New York, and James Cheney, a citizen of Indiana, filed a bill to foreclose a mortgage held by them against the Wabash, St. Louis and Pacific Railway Company in the State courts of several States where the mortgaged property lay. These suits were removed to the proper Federal courts. There was the necessary diversity of citizenship. The road was sold under a decree of foreclosure, but the road

[1] Only that portion of the opinion dealing with parties is reprinted.
In the following cases are to be found examples of nominal parties: New Chester Water Co. v. Holly Manuf'g. Co., 53 Fed. 19, 25-26, 3 C. C. A. 399, 405-406, 3 U. S. App. 264, 279 (1892); Franklin v. Conrad-Stanford Co., 137 Fed. 737, 739, 70 C. C. A. 171, 173 (1905); Atchison, T. & S. F. Ry. Co. v. Phillips, 176 Fed. 663, 100 C. C. A. 215 (1910); White v. Chase, 201 Fed. 896, 898, 120 C. C. A. 194, 196 (1912). But see Post v. Buckley, 119 Fed. 249 (1902).—Ed.

was not ordered to be turned over to the purchasers by the receivers, who had been in possession. While the road was still in the possession of the receivers, Knox and Jesup, mortgagees under a prior mortgage, commenced a suit in the same Federal Court ordering said sale to foreclose their mortgage, to which suit numerous persons, including one Compton, having interests in or claims upon the road were made parties, and filed answers and cross bills, citizens of the same State appearing upon both sides of the controversy.[1]

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

The first ground pressed on us by appellant's counsel for reversing the decree of the Circuit Court is that there was no jurisdiction to enter it. The contention is—First, that the Circuit Court had no power to entertain and grant relief on the bill of Knox and Jesup, because the parties to it had not the necessary diverse citizenship; and, second, that no power existed to bring in Compton, because, he being a citizen of the District of Columbia, his presence as a party would destroy the necessary diversity of citizenship, even if it before existed. It must be conceded that the Circuit Court had no jurisdiction to hear and determine the controversies presented by the Knox and Jesup bill, on the ground of diverse citizenship of the parties, for it did not exist. The jurisdiction was assumed on a very different ground. When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been

[1] The facts are restated, and only those essential for the understanding of that portion of the opinion dealing with jurisdiction are given.—Ed.

appointed could grant such relief. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, and deliver an unclouded title to a purchaser. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad, to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the parties to their bill. The foregoing reasoning is fully supported by many decisions of the Supreme Court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down by the Supreme Court of the United States in a long line of cases. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, Id. 368; Bank v. Horn, 17 How. 151; Pullman v. Osborn, Id. 471; Freeman v. Howe, 24 How. 450; Youley v. Lavender, 21 Wall. 276; Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906. Again, every

court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, either in the form of a simple motion, or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such power, independent of statutory jurisdiction, is recognized by the Supreme Court in Freeman v. Howe, 24 How. 450; Minnesota Co. v. St. Paul Co., 2 Wall. 609-633; Railroad Co. v. Chamberlain, 6 Wall. 748; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. 148; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Johnson v. Christian, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135; Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61.

Now, it frequently happens that under the process of the Federal courts, exercising the original and lawful jurisdiction conferred expressly by the Federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, by lien, mortgage, and in other ways. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the Federal Court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property, that such third persons should be permitted, at once, to have specific relief, which can only be granted by a court having possession and control of the property. And yet, in accordance with the principle already stated, no court but the Federal Court can exercise possession and control over the property in its custody. Of necessity, therefore, the Federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the Federal Court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent jurisdiction, were the property not impounded in the Federal Court. In Freeman v. Howe, 24 How. 450, a sheriff, under a replevin from a State court sued out by mortgagees of a railroad company, ousted a United States marshal from possession of certain railroad cars attached by him under *mesne* process from a Federal Court. The act of the sheriff was

held void, without respect to the merits of the conflicting claims of the plaintiffs in the two proceedings, because the cars were in the custody of the Federal Court, and beyond the reach of the sheriff, when he served the replevin. And it was answered, to the argument that in this way the replevying mortgagees were left remediless, because their citizenship prevented recourse to the Federal Court, that the Federal Court, to prevent such abuse of its process, had jurisdiction, ancillary to its original jurisdiction asserted in the attachment, to afford the mortgagees all the relief they could obtain in any court where the jurisdiction was not limited by citizenship. In Bank v. Calhoun, 102 U. S. 256, a Federal Court had taken possession, by its receiver, of the mortgaged railroad in a foreclosure suit. In an action between other parties, an attachment was sued out, and levied upon the road. It was held that the Federal Court, having drawn to itself the subject-matter of the litigation, had acquired the right and jurisdiction to decide upon all conflicting claims to the possession and control of the road, and that the attachment suit which had begun in the State court could be properly removed, by stipulation of the parties, to the Federal Court, because, in the language of Justice MILLER:

"The parties did no more than what they could have been compelled to do by the injunction of the latter (that is, the Federal Court), and what would have been done by such compulsory order, if they had not submitted to it by agreement."

In Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, a marshal, on *mesne* process issuing out of the Federal Court, attached property, as the property of the defendant, in the possession of another, who claimed to own it. It was held that this other, although a citizen of the same State as the defendant, might seek redress in the Federal Court, either by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances. In this case Mr. Justice MATTHEWS reviews the decision and language of Mr. Justice NELSON in the case of Freeman v. Howe, and, speaking for the court, fully approves the same. He said:

"It has been sometimes said that this statement was *obiter dictum*, and not to be treated as the law of the case; but it was, in point of fact, a substantial part of the argument in support of the judgment, and, on consideration, we feel bound to confirm it, in substance, as logically necessary to it. For if we affirm, as that decision does, the exclusive right of the Circuit Court in such a case to maintain the custody of property seized and held under its

process by its officers, and thus to take from owners wrongfully deprived of possession the ordinary means of redress by suits for restitution in State courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and as this may not be done by original suits, on account of the nature of the jurisdiction, as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in ancillary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant from whose possession it has been taken the opportunity to assert and enforce his right."

In Gumbel v. Pitkin, 124 U. S. 132, 8 Sup. Ct. 379, a United States marshal, by invalid process issued from a Federal Court, took possession of property. A sheriff sought to levy on the property by virtue of a lawful attachment for a State court, and left it with the marshal as garnishee. Subsequently the marshal sold the property under a valid process coming to his hands after the sheriff's attempt at garnishment. It was held that the plaintiff in the State attachment proceedings might intervene in the Federal Court, and be awarded the priority to which he would have been entitled had the sheriff been permitted to make an actual levy under his writ. Said Mr. Justice MATTHEWS, in summing up the conclusion of the court:

"The case, therefore, stands thus: For the reasons growing out of the peculiar relation between Federal and State courts exercising co-ordinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto. The plaintiff in error, having pursued his remedy by action against his debtor in the State court, to which alone, by reason of citizenship, he could resort, attempted the levy of his writ of attachment upon the goods in the possession of the marshal. Not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee. Not being able by this process to subject the marshal to answer personally to the State court, he made himself a party to the proceedings in the Circuit Court, by its leave, and proceeded in that tribunal against its officer and the creditors for whom he had acted. On a regular trial it appeared as a fact that at the time of the notice the marshal

was in possession of the property wrongfully, as an officer, and therefore chargeable as an individual. It was competent for the Circuit Court, and, having the power, it was its duty, to hold the marshal liable as garnishee; and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties, on the footing of these rights, and give to the plaintiff in error the priority over all other creditors to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled."

The case most like the case at bar is that of Morgan's L. & T. Railroad & Steamship Co. v. Texas Central Railway Company, a citizen of Texas, against the Farmers' Loan & Trust Company, a citizen of New York, and the Metropolitan Trust Company, a citizen of New York, seeking to have certain debts owing by the Texas Central Railway Company to it declared a lien on the railroad of the railway company, prior in right to mortgages upon the same road held by the other defendants of the two trust companies. A receiver had been appointed in the original suit. Subsequently the Farmers' Loan & Trust Company filed its cross bill against the complainant and its codefendants, including the Metropolitan Trust Company. As the two trust companies were citizens of the same State,—New York—the jurisdiction of the court could not be maintained to give relief on the cross bill, if it depended on diverse citizenship. Objection was taken to the action of the court in granting foreclosure upon the cross bill, but the objection was not sustained in the Supreme Court of the United States. Said the chief justice, on page 201, 137 U. S., and page 61, 11 Sup. Ct.:

"It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross bill, but that is immaterial. The subject-matter was the same, although the complainant in the cross bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained, except through a cross bill, and different relief from that prayed in the original bill would necessarily be sought. * * * *And whether this bill be regarded as a pure cross bill, as an original bill in the nature of a cross bill, or as an original bill,* there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the Circuit Court did not depend

upon the citizenship of the parties, but on the subject-matter in litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

The clause in the foregoing which we have italicized shows clearly that the ancillary jurisdiction of the Federal Court growing out of its possession of property may be invoked by original bill as well as by intervening petition.

Other cases to the same point are Trust Co. v. Bridges, 6 C. C. A. 539, 57 Fed. 753; Conwell v. Canal Co., 4 Biss. 195, Fed. Cas. No. 3,148; Carey v. Railway Co., 52 Fed. 671.

The bill of Knox and Jesup was therefore cognizable by the court below, as ancillary to the litigation in which the mortgage of the Central Trust Company and Cheney, trustees, was foreclosed. That, it will be remembered, was a consolidation of the insolvency bill filed by the Wabash, St. Louis & Pacific Railway Company against the Central Trust Company and others, and of the foreclosure bills of the Central Trust Company removed from the State court. Some claim is made that the Federal Court had no jurisdiction to entertain the insolvency bill, because such a proceeding was without precedent. Whether precedents in equity practice and jurisprudence justified the bill was for the decision of the court in which the bill was filed. It cannot be reviewed in this proceeding, which, while dependent on that, and ancillary to it, is collateral to it, in so far as to prevent an examination of the correctness of the orders and decrees made in it. Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781. The jurisdictional fact upon which the right of the court below to hear and determine the cause of action presented by Knox and Jesup's bill rested was the pending possession by that court's receivers of the property sought to be sold in foreclosure. Johnson v. Christian, 125 U. S. 642-646, 8 Sup. Ct. 989, 1135. It was unnecessary to look further, for, even if the order under which that possession had been taken was irregular or erroneous, Gumbel v. Pitken, Krippendorf v. Hyde, and Freeman v. Howe, cited above, all show that such possession would impose upon the court the duty, and would draw to it the jurisdictional power, of granting any relief requiring for its full measure the possession and control of the property.[2]

[2] Only a portion of the opinion is reprinted.

For a comparatively exhaustive list of cases in which ancillary jurisdiction was involved, see 1 Foster Federal Practice (5th Ed.) 142-151.—Ed.

POOLEY v. LUCO.

Circuit Court, S. D. California. 1896.

72 Fed. 561.

Wellborn, District Judge. One of the defendants, Juan M. Luco, pleads to the jurisdiction of the court, and the question now to be determined is as to the sufficiency of this plea. The suit is brought by the complainant, a subject of Great Britain, against said Luco and various other parties, alleged to be citizens of the United States, to foreclose a mortgage executed by said Luco and others of the defendants, on certain real estate, situated in the county of San Diego, in the Southern district of California. Said Luco denies that he is a citizen of the United States, and alleges that he is a citizen of Chile, and the duly-appointed and recognized consul general of Chile for the United States, residing in the city of San Francisco, State of California.

Jurisdiction, if it exists at all, must rest upon one or more of the following grounds: First, diverse citizenship of the parties; second, consular status of defendant Luco; third, location in this district of the res.—the mortgaged property. These grounds I will examine in the order of their statement.

The question whether or not a Circuit Court has jurisdiction of a case, on the ground that both parties are aliens, has been authoritatively and often decided in the negative. Montalet v. Murray, 4 Cranch 46; Hodgson v. Bowerbank, 5 Cranch 304; Prentiss v. Brennan, Fed. Cas. No. 11,385; Jackson v. Twentyman, 2 Pet. 136; Rateau v. Bernard, Fed. Cas. No. 11,579; Hinckley v. Byrne, 1 Deady, 224, Fed. Cas. No. 6,510.

In the last case, Deady, J., used the following language:

"It has long since been settled that an action between aliens cannot be maintained in the Circuit Court; that the language of the judiciary act giving jurisdiction where 'an alien is a party' must be restrained within the terms of the Constitution, which only 'extends the judicial power' to an action between an alien and a citizen of a State of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case."

The controversy in the case at bar being between aliens, there is not such diverse citizenship as brings the case within the Federal jurisdiction.[1]

[1] Only a portion of the opinion is reprinted.—Ed.

WILSON v. KNOX COUNTY.

Circuit Court, N. D. Missouri, E. D. 1890.

43 Fed. 481.

MILLER, Justice. This case is pending in the northern division of this district, but by stipulation of counsel has been argued before us in the eastern division of the district.

The question that arises on the demurrer to the plea of the jurisdiction is whether the assignee of the warrants can maintain a suit thereon in this court, under the Judiciary Act of March 3, 1887, although the original holder was incapacitated from maintaining such a suit. The clause of the act under which the question arises is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The contention for the plaintiff is that the court has jurisdiction of the suit at bar, because the instruments sued upon are not "payable to bearer," and are "made by a corporation." This we think is an erroneous view of the law. Congress did not intend to give the Federal courts jurisdiction of all suits by assignees of promissory notes and other choses in action, if the assigned choses were made by a corporation and were not payable to bearer. That construction would extend the jurisdiction of the Federal courts, without any apparent reason, over a class of suits by assignees of choses in action, never before within their jurisdiction, whereas the main purpose of the Act of 1887 seems to have been to curtail their jurisdiction. The general rule enunciated by the statute is that the Federal courts shall not have jurisdiction of a suit by an assignee "of a promissory note or other chose in action," when the assignor could not maintain such a suit. The clause, "if such instrument be payable to bearer and be not made by any corporation," operates as an exception to the general rule, and gives the Federal courts jurisdiction of those suits by assignees, where the action is founded on an obligation, made by a corporation, that is payable to bearer, and is negotiable by mere delivery. In the

light of the previous legislation on the subject, our view is that Congress intended by the Act of March 3, 1887, to prohibit suits in the Federal Court by assignees of choses in action, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation. Construed in this way, the Act of 1887 operates to restrict to some extent the jurisdiction exercised under the Act of March 3, 1875, which was probably the intention of the lawmaker. The instruments sued upon in this instance, though executed by a *quasi* corporation, are not payable to bearer, and are not even negotiable instruments under the law merchant. It follows, therefore, that an assignee of the warrants in question has no greater right to sue in this court than the original payee, and the demurrer to the plea will be overruled.

The views we have expressed are also entertained in other circuits and districts. Vide Negass v. New Orleans, 33 Fed. Rep. 196; Rollins v. Chaffee Co., 34 Fed. Rep. 91.[1]

CONN. v. CHICAGO, B. AND Q. R. CO.

Circuit Court, S. D. Iowa, W. D. 1891.

48 Fed. 177.

At Law. Action by J. W. Conn against the Chicago, Burlington & Quincy Railroad Company for overcharges in freight, the claims having been assigned to him by the original owners. On plea in abatement to the jurisdiction and the evidence thereon. Plea overruled.

SHIRAS, J. This action was brought originally in the District Court of Mills County, Iowa, and was thence removed to this court upon the application of the defendant corporation, on the ground of diverse citizenship, it being averred in the petition for removal that the plaintiffs, when the suit was brought, and ever since, were, and have continued to be, citizens of Nebraska, and the defendant was and is a corporation created under the laws

[1] As to the time when there must be diversity of citizenship between the original parties to the chose in action in order to give the assignee the right to sue the original obligor in the federal court, see Thaxter v. Hatch, 23 Fed. Cas. No. 13866, p. 897, 6 McLean, 68 (1853.)—Ed.

of the State of Illinois. The petition in the action contains a large number of counts, each one being based upon an alleged overcharge for freight shipped over the defendant's line of railroad by a number of individuals or firms, whose claims for damages for such alleged overcharges have all been assigned and transferred to the plaintiffs.

The first question arising upon the record is whether, under the statute now in force, an action based upon assigned claims of this kind can be removed from a state to the Federal Court, regardless of the citizenship of the assignors of the claims, or whether it is necessary, to sustain the jurisdiction, that it appear on the face of the record that the assignors of the claims, as well as the assignees, are, and were when the suit was brought, citizens of a state or states other than that of the defendant. The proviso in the Amendatory Act of August 13, 1888, is that the United States Circuit Court shall not—

"Have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court if no such assignment or transfer had been made."

The limitation thus enacted in regard to suits upon assigned causes of action is expressly confined to those brought to recover the contents of a promissory note or other chose in action; and in Ambler v. Eppinger, 137 U. S. 480, 11 Sup. Ct. Rep. 173, it is held that the phrase "chose in action" cannot be construed to include rights of action founded on some wrongful act or some neglect of duty, causing damage, but must be limited to suits founded upon contracts containing within themselves some promise or duty to be performed. In Deshler v. Dodge, 16 How. 622, and Bushnell v. Kennedy, 9 Wall. 387, the same construction was given to the similar phrase found in the eleventh section of the Act of 1789; so that it is thus clearly decided by the Supreme Court that the limitation found in the act of 1888, and already cited, cannot be made applicable to claims of the nature of those declared on in the present action, which are for damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates for the transportation of property over its line of railway.[1]

[1] Only a portion of the opinion is reprinted.—Ed.

POWER AND IRRIGATION CO. v. CAPAY DITCH CO.

Circuit Court of Appeals, Ninth Circuit. 1915.

226 Fed. 634, 141 C. C. A. 390.

The Central Land Company gave certain notes to the Capay Ditch Company in return for a loan on November 13th, 1907. To secure the payment of these notes it also gave the latter company a deed to land which, on its face, was absolute. All those ever obtaining rights under the deeds knew what the facts were. The plaintiff is the successor in interest of the grantor. The Statute of Limitations having run against the note and deed, which, according to the law of California where the land lay, had only the effect of a mortgage, the plaintiff now wishes to quiet title to the land covered by the deed. The original mortgagor and mortgagee, as well as all of the defendants other than the said mortgagee were citizens of California. The plaintiff was a citizen of Arizona.[1]

GILBERT, Circuit Judge (concurring).—In its essential features the cause of suit pleaded in the complaint is one to quiet title to real estate. The plaintiff has acquired by conveyance the title to land which its predecessor in interest had subjected to a mortgage. The mortgage lien has expired by limitation, but the deed, which was intended as a mortgage, and the subsequent conveyances of the land constitute a cloud upon the plaintiff's title. The plaintiff must, in equity, pay the mortgage debt in order to obtain the relief which it seeks. Its right to seek and obtain that relief does not depend, however, upon an assigned chose in action, but upon a deed of real estate. Said the court in Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374:

"There was no intent to prevent assignees and purchasers of property from maintaining an action in the Federal Court to recover such property, even though the purchaser was an assignee and the deed might, in a sense, be called a chose in action. * * * Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to recover property or an interest in property when the requisite value and diversity of citizenship existed."

[1] The facts have been abbreviated.—Ed.

The decision in that case is authority also for the proposition that section 24 of the Judicial Code was not intended to bring about any change in the law, but was intended merely as a continuation of the existing statute. Said the court:

"In continuing the statute Congress also carried forward the construction that the restriction on jurisdiction applied to suits for damages for breach of contract, but did not apply to suits for a breach of things."

That statute has been held applicable to cases where the plaintiff has acquired by assignment the right to foreclose a mortgage (Sheldon v. Sill, 8 How. 411, 12 L. Ed. 1147; Blacklock v. Small, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70; Kolze v. Hoadley, 200 U. S. 76, 26 Sup. Ct. 220, 50 L. Ed. 377), and to suits to compel specific performance of a contract (Plant Investment Co. v. Key West Railway, 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358; Shoecraft v. Bloxham, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084) but not to actions to recover the possession of a specific chattel or damages for its wrongful caption or detention (Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084; Ambler v. Eppinger, 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765; Buckingham v. Dake, 112 Fed. 258, 50 C. C. A. 492), nor to actions arising upon breach or performance of a contract, occurring after its assigment (American Colortype Co. v. Continental Co., 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404; Paige v. Town of Rochester (C. C.) 137 Fed. 663; Oak Grove Const. Co. v. Jefferson County, 219 Fed. 858, 135 C. C. A. 528).

Said the court in Corbin v. County of Black Hawk, 105 U. S. 659, 665, 26 L. Ed. 1136:

"The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit to recover such contents."

And the court further said:

"The obligation or the promise contained in a contract is its contents, when suit is brought to enforce such obligation."

And while the court in that case held that the promise to receive money stipulated in a contract to be paid by purchasers of land as a foundation for their right to receive title thereto is the essence of the contract, and that a suit to compel the acceptance of that money is a suit to enforce such promise, therefore is a suit to recover the contents of the contract, that principle does not apply to the present case, for the reason that here there is no existing

promise or contract to pay the mortgage debt. If there is an obligation upon the plaintiff to pay that debt, it rests, not upon a contract to pay it, but it is imposed as a condition for obtaining the desired relief pursuant to a principle of equity which requires that the plaintiff, while seeking relief, shall do that which justice requires of it, the payment of a debt, although the obligation to pay it has expired by limitation, and could not be enforced at law. Raynor v. Drew, 72 Cal. 308, 13 Pac. 866; Baker v. Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200.[2]

AMBLER v. EPPINGER.

Supreme Court of the United States. 1890.

137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765.

The plaintiff was the assignee of one Russell of the right the latter had against the defendants for cutting down trees on the lands of the plaintiff and Russell. The record showed that the plaintiff was a citizen of New York, and that the defendants were citizens of Florida. It failed to disclose the citizenship of Russell.[1]

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The record is silent as to the citizenship of Russell, who assigned his interest to the plaintiff; and the defendants below, the plaintiffs in error here, contend that the Circuit Court was therefore excluded by the act of March 3, 1887, from jurisdiction of the action, it not appearing that he could have prosecuted in the Circuit Court a suit upon a claim. That act, after declaring in its first section that certain suits shall not be brought in the Circuit or District courts, adds: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such

2 A concurring opinion by Judge Ross is omitted.
Compare Aggers v. Shaffer, 256 Fed. 648, 648-649, 168 C. C. A. 42, 42-43 (1919); Harlan v. Houston, 258 Fed. 611, 612-613 (1919).—Ed.

1 The facts are restated.—Ed.

court to recover the said contents if no assignment or transfer had been made." 24 Stat. c. 373, pp. 552, 553.

This act, as appears on its face, does not embrace, within its exceptions to the jurisdiction of those courts, suits by an assignee upon claims like the demand in controversy. The exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other choses in action, where the demand sought to be enforced is represented by an instrument in writing, payable to bearer, and not made by a corporation, the words following the designation of choses in action indicating the manner in which they are to be shown. They must be such as arise upon contracts of the original parties, and not founded, like the one in controversy, upon a trespass to property.

The construction given by this court in Deshler v. Dodge, 16 How. 622, to the clause in the eleventh section of the Judiciary Act, which denied to any Circuit or District Court "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," is in harmony with the construction we give to the act of 1887. It was there held that the exception by that section of the jurisdiction of those courts of suits by an assignee did not extend to a suit on a chose in action to recover possession of a specific chattel or damages for its wrongful caption or detention, although the assignee could not himself sue in that court. And in the subsequent case of Bushnell v. Kennedy, 9 Wall. 387, it was said that the exceptions to the jurisdiction applied only to rights of action founded on contracts which contained within themselves some promise or duty to be performed, and not to mere naked rights of action founded on some wrongful act or some neglect of duty to which the law attaches damages.[2]

LOEB v. COLUMBIA TOWNSHIP TRUSTEES.

Supreme Court of the United States. 1900.

179 U. S. 472, 21 S. Ct. 174, 45 L. Ed. 280.

This action was brought in the court below by Loeb, a citizen of Indiana, against the Trustees of Columbia Township in Hamil-

[2] Only a portion of the opinion is reprinted.—Ed.

ton County, Ohio. The petition did not show that the plaintiff was the original holder of the bonds sued on. It was objected that the court had not jurisdiction of the action if the plaintiff was an assignee or subsequent holder of the bonds, for they were payable to bearer, and were not made by a corporation.[1]

Mr. Justice Harlan delivered the opinion of the court * * *

II. One of the questions arising upon the record is whether the defendant township is a corporation within the meaning of the clause of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433, 434, § 1, which excludes from the cognizance of a Circuit or District Court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This question affects the jurisdiction of the Circuit Court to take cognizance of this case.

When the act of 1888 was passed it was the established law that a municipal corporation created under the laws of a State with power to sue and be sued and to incur obligations was to be deemed a citizen of that State for purposes of suit by or against it in the courts of the United States. In Cowles v. Mercer County, 7 Wall. 118, 122, this court said: "It is enough for this case that we find the Board of Supervisors (of the county) to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution." Lincoln County v. Luning, 133 U. S. 529, 531; McCoy v. Washington Co., 3 Wall, Jr. C. C. R. 381, 384; Dillon's Removal of Causes, § 105. We perceive nothing in that act indicating any purpose of Congress to exclude from the jurisdiction of the Circuit Courts of the United States suits by or against municipal corporations having authority by the laws creating them to sue or to incur liabilities in their corporate name. It must therefore be taken that the words "any corporation" in the act of 1888 include municipal as well as private corporations. And it is the settled law of Ohio that a township is suable on

[1] The facts are restated.—Ed.

account of having liabilities incurred by it. Harding v. Trustees of New Haven Township, 3 Ohio 227; Trustees of Concord Township v. Miller, 5 Ohio 184; Wilson v. Trustees of No. 16, 8 Ohio 174. Now by the statutes of Ohio the defendant township was constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law, and was made capable of suing and being sued, pleading and being impleaded. 1 Bates' Anno. Stat. Ohio, §1376. It was created for purposes of local administration, and is a corporation. Fairfield Township v. Ladd, 26 Ohio St. 210, 213; Lane v. State, 39 Ohio St. 312. As therefore the bonds in suit were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them without reference to the citizenship of any prior holder. Thompson v. Perrine, 106 U. S. 589, 592-3. This point was properly decided for the plaintiff.[2]

WHITE v. VERMONT AND MASSACHUSETTS RAILROAD COMPANY.

Supreme Court of the United States. 1858.

62 U. S. (21 Howard) 575, 16 L. Ed. 221.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The suit was brought in the court below by the plaintiff (White) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed state of facts, and, among others, that the bonds in question were issued by the company, in regular course, and for a sufficient consideration; and that payment had been demanded and refused. Coupons for the accruing interest, previous to the maturity of the bonds, had been duly paid.

2 Only a portion of the opinion is reprinted.

A county is considered a corporation under the assignment statute. Lyon County v. Keene Five-Cent Sav. Bank, 100 Fed. 337, 337-338, 40 C. C. A. 391, 391-392 (1900).—Ed.

It was further agreed that bonds of this description, issued by the company, were sold in the market, and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person a citizen of Massachusetts, and were payable in blank, no payee being inserted; that they came into the hands of the plaintiff through several intervening holders, in regular course; and that he then and since lived in the State of New Hampshire, and, before this suit was brought, filled up the blank by inserting "Selden F. White, or order," the name of plaintiff, without the knowledge or consent of the defendants.

The court ruled that the suit could not be sustained, for want of jurisdiction.

The ground upon which this ruling below is sought to be maintained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the Federal Court, within the prohibition of the eleventh section of the Judiciary Act. (15 Pet. R. 125; 2 ib. 318; 3 How. 574; 8 ib. 441.)

In answer to this ground, we think it quite clear, on looking into the agreed state of facts, in connection with the bonds and the mortgage given to secure their payment, that it was the intention of the company, by issuing the bonds in blank, to make them negotiable, and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or if any, a meaning calculated, if not intended, to embarrass the title of the holder.

Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the Federal Court; for, until the plaintiff chose to fill up the blank, he is regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order.

At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below.[1]

BUCKNER v. FINLEY & VAN LEAR.

Supreme Court of the United States. 1829.

27 U. S. (2 Peters) 586, 7 L. Ed. 528.

MR. JUSTICE WASHINGTON delivered the opinion of the court.[2]

This is an action of assumpsit founded on a bill of exchange drawn at Baltimore, in the State of Maryland, upon Stephen Dever at New Orleans, in favor of R. L. Colt, a citizen of Maryland, who endorsed the same to the plaintiff, a citizen of New York. The action was brought in the Circuit Court of the United States for the District of Maryland; and upon a case agreed, stating the above facts, the judges of that court were divided in opinion, whether they could entertain jurisdiction of the cause upon the ground insisted upon by the defendant's counsel, that the bill was to be considered as inland. The difficulty which occasioned the adjournment of the cause to this court, is produced by the eleventh section of the Judiciary Act of 1789, which declares, that no District or Circuit Court shall have "cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

1 A portion of the opinion, which held that the bonds involved in this action were negotiable, is omitted.

Bonds payable to "—— or order" were held to be bearer bonds. Lyon County v. Keene Five-Cent Sav. Bank, 100 Fed. 337, 337-338, 40 C. C. A. 391, 391-392 (1900).

Coupons from county bonds payable to bearer when detached from the bonds which are payable to the order of specific persons are treated as bearer instruments. Reynolds v. Lyon County, 97 Fed. 155, 157 (1899). But see Clarke v. Janesville, 5 Fed. Cas. No. 2,854, p. 962, 1 Bissell, 98 (1856).

Compare Thomson v. Town of Etton, 100 Fed. 145 (1900).

See also Towne v. Smith, 24 Fed. Cas. No. 14,115, p. 93, 95, 1 Woodbury & Minot, 115, 119 (1846); Bonafee v. Williams, 44 U. S. (3 Howard) 574, 577, 11 L. Ed. 732, 733 (1845); Bank of British North America v. Barling, 46 Fed. 357 (1891); Thompson v. Searcy County, 57 Fed. 1030, 1036, 6 C. C. A. 674, 680, 12 U. S. App. 618, 628 (1893).—Ed.

2 The facts are omitted.—Ed.

The only question is, whether the bill on which the suit is founded, is to be considered a foreign bill of exchange.

It is to be regretted that so little aid in determining this question is to be obtained from decided cases, either in England or in the United States.

Sir William Blackstone, in his Commentaries,[3] distinguishes foreign from inland bills, by defining the former as bills drawn by a merchant residing abroad upon his correspondent in England, or vice versa; and the latter as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. Chitty, p. 16, and the other writers[4] on bills of exchange are to the same effect; and all of them agree, that until the statutes of 8 and 9 W. III. ch. 17, and 3 and 4 Anne, ch. 9, which placed these two kinds of bills upon the same footing, and subjected inland bills to the same law and custom of merchants which governed foreign bills; the latter were much more regarded in the eye of the law than the former, as being thought of more public concern in the advancement of trade and commerce.

Applying this definition to the political character of the several States of this Union in relation to each other, we are all clearly of opinion, that bills drawn in one of these States, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the States are necessarily foreign to, and independent of, each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed, with great force, by the president of the Court of Appeals of Virginia, in the case of Warder v. Arrell, 2 Wash. 298; where he states, that in cases of contracts, the laws of a foreign country, where the contract was made, must govern; and then adds as follows: "The same principle applies, though with no greater force, to the different States of America; for though they form a confederated Government, yet the several States retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign."

This character of the laws of one State in relation to the others,

[3] Vol. ii, 467.

[4] Bayley, Kyd.

is strongly exemplified in the particular subject under consideration; which is governed, as to the necessity of protest and rate of damages, by different rules in the different States. In none of these laws, however, so far as we can discover from Griffith's Law Register, to which we were referred by the counsel, except those of Virginia, are bills, drawn in one State upon another, designated as inland; although the damages allowed upon protested bills of that description are generally, and with great propriety, lower than upon bills drawn upon a country foreign to the United States, since the disappointment and injury to the holder must always be greater in the latter than in the former case. It is for the same reason, no doubt, that, by the laws of most of the States, bills drawn in and upon the same State, and protested, are either exempt from damages altogether, or the rate is lower upon them than upon bills drawn on some other of the States.

The only case which was cited at the bar, or which has come to our knowledge, to show that a bill drawn in one State upon a person in any other of the States, is an inland bill, is that of Miller v. Hackley, 5 Johns, Rep. 375. Alluding to this case, in the third volume of his Commentaries, p. 63, in a note, Chancellor Kent remarks very truly, that the opinion was not given on the point on which the decision rested; and he adds, that it was rather the opinion of Mr. Justice VAN NESS than that of the court. It is not unlikely, besides, that that opinion was, in no small degree, influenced by what is said by Judge Tucker in a note to 2 Black. Com. 467; which was much relied upon by one of the counsel in the argument, where the author would appear to define an inland bill, as being one drawn by a person residing in one State on another within the United States. He is so understood by Chancellor Kent, in the passage which has been referred to: but this is undoubtedly a mistake, as the note manifestly refers to the laws of Virginia; and by an act of that State, passed on the 28th day of December, 1795, it is expressly declared, that all bills of exchange drawn by any person residing in that State, on a person in the United States, shall be considered in all cases as inland bills. The case of Miller v. Hackley, therefore, can hardly be considered as an authority for the position which it was intended to maintain. We think it cannot be so considered by the courts of New York, since the principle supposed to be decided in that case, would seem to be directly at variance with the uniform decisions of the same courts upon the subject of judgments rendered in the tribunals of the sister States. In the case of Hitchcock v. Aicken,

1 Caines 460, all the judges seem to have treated those judgments as foreign in the courts of New York; and the only point of difference between them grew out of the construction of the first section of the fourth article of the Constitution of the United States, and the Act of Congress of the 26th of May, 1790, ch. 38, respecting the effects of those judgments, and the credit to be given to them in the courts of the sister States.

It would seem from a note to the case of Bartlett v. Knight, 1 Mass. Rep. 430, where a collection of State decisions on the same subject is given; that these judgments had generally, if not universally, been considered as foreign by the courts of many of the States. If this be so, it is difficult to understand upon what principle bills of exchange drawn in one State upon another State can be considered as inland; unless in a State where they are declared to be such by a statute of that State.

It has not been our good fortune to see the case of Duncan v. Course, 1 South Carolina Constitutional Reports, 100; but the note above referred to in 3 Kent's Com. informs us, that it decides that bills of this description are to be considered in the light of foreign bills; and the learned commentator concludes, upon the whole, and principally upon the ground of the decision just quoted; that the weight of American authority is on that side.

That it is so, in respect to the necessity of protesting bills of that description, was not very strenuously controverted by the counsel for the defendant. But he insists that, under a just construction of the eleventh section of the judiciary act, concerning the jurisdiction of the Federal courts, these bills ought to be considered and treated as inland. The argument is, that the mischief intended to be remedied by the provisions in the latter part of that section, by the assignment of promissory notes and other choses in action, is the same in relation to bills of exchange of the character under consideration.

We are of a different opinion. The policy which probably dictated this provision in the above section, was to prevent frauds upon the jurisdiction of those courts, by pretended assignments of bonds, notes, and bills of exchange strictly inland; and as these evidences of debt generally concern the internal negotiations of the inhabitants of the same State, and would seldom find their way fairly into the hands of persons residing in another State; the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different States with each other. It is quite otherwise as to bills drawn in one

State upon another. They answer all the purposes of remittances, and of commercial facilities, equally with bills drawn upon other countries, or vice versa; and if a choice of jurisdictions be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so to that of the former.

Nor does the reason for restraining the transfer of other choses in action, apply to bills of exchange of this description; which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different States of the Union. We conclude upon the whole, that in no point of view ought they to be considered otherwise than as foreign bills.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Maryland, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, and was argued by counsel. On consideration whereof, it is the opinion of this court that the bill of exchange on which this action is brought, ought to be considered as a foreign bill within the meaning of the eleventh section of the Judiciary Act of the 24th of September, 1787, and that the said Circuit Court has jurisdiction of this cause; whereupon it is considered, ordered and adjudged, by this court, that it be certified to the said Circuit Court for the district of Maryland, that the bill of exchange on which this action is brought, ought to be considered as a foreign bill, within the meaning of the eleventh section of the Judiciary Act of the 24th of September, 1787; and that that court has jurisdiction of the cause.

YOUNG v. BRYAN.

Supreme Court of the United States. 1821.

19 U. S. (6 Wheaton) 146, 5 L. Ed. 228.

Error to the Circuit Court of Tennessee.

This was an action of assumpsit, brought in the court below, by the defendants in error, citizens of Pennsylvania, against the plaintiff in error, a citizen of Tennessee, as the endorser of a promissory note drawn by another citizen of Tennessee, and endorsed to the plaintiffs. The only questions in the cause were,

(1) Whether the court below had jurisdiction; and (2) whether notice of protest was necessary to charge the endorser in this case. Judgment having been rendered against the defendant below, the cause was brought by writ of error to this court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court, that a suit may be brought in the Circuit Court by the endorsee against the endorser, whether a suit could be there brought against the drawer or not. In such a case, the endorser does not claim through an assignment. It is a new contract entered into by the endorser and endorsee, upon which the suit is brought; and if the endorsee is a citizen of a different State, he may bring an action against the endorser in the Circuit Court.[1]

PORTAGE CITY WATER CO. v. CITY OF PORTAGE.

Circuit Court, W. D. Wisconsin. 1900.

102 Fed. 769.

On demurrer to complaint for want of jurisdiction.

BUNN, District Judge.—The demurrer to the complaint raises an important and interesting question of jurisdiction, under that clause of the Jurisdiction Act of 1887-88 providing as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee or any subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made." 25 Stat. 433, 434, c. 866, § 1.

It appears by the complaint that there was a contract or franchise granted by the city of Portage, Wis., the defendant, to three citizens of the State of New York, for the purpose of constructing a system of waterworks for the city. These New York men who held the contract assigned the same to the Portage City Water-

[1] The part of the opinion dealing with the second question is omitted. Compare Phillips v. Preston, 46 U. S. (5 Howard) 278, 290-291, 12 L. Ed. 152, 157 (1847); Mollan v. Torrance, 22 U. S. (9 Wheaton) 537, 6 L. Ed. 154 (1824).—Ed.

works Company, a corporation presumably organized under the laws of Wisconsin. Afterwards the plant constructed by the corporation went into the hands of a receiver of this court in a suit by the bondholders to foreclose. The action is brought by the Portage City Water Company, a corporation organized and existing under the laws of the State of Maine, and a citizen of that State, against the city of Portage, a municipal corporation of Wisconsin, to recover the sum of $3,457.50, with interest, being the aggregate of several sums claimed to be due upon a contract for supplying the city with water. The complaint alleges: That on April 8, 1887, the defendant passed an ordinance authorizing J. F. Moffett, H. C. Hodgkins, and J. V. Clarke, all citizens of the State of New York, and doing business under the firm name of Moffett, Hodgkins & Clarke, to construct, maintain and operate a system of waterworks in the defendant city for the purpose of supplying the city and its inhabitants with water. That said ordinance was duly passed and accepted by Moffett, Hodgkins & Clarke, and became and is a binding contract. That Moffett, Hodgkins & Clarke proceeded with the work of putting in said waterworks plant pursuant to the contract, and began to erect and construct all necessary basins, filtering galleries, reservoirs, water towers, pump houses, buildings, engines, machinery, mains, pipes, etc., necessary for supplying the city with water. That thereafter, in the year 1887, they sold and assigned to the Portage City Waterworks Company all their right and title under the contract. The citizenship of the Portage City Waterworks Company is not averred, but presumably it was a Wisconsin corporation. By this assignment all the interest of said Moffett, Hodgkins & Clarke in the contract passed to the said last-named company. That said Portage City Waterworks Company went on and completed the waterworks as contemplated by the said contract and ordinance. That afterwards, in April, 1895, an action was commenced in this court by the owners of bonds issued by the Portage City Waterworks Company to foreclose a mortgage upon the water plant, securing payment of the bonds. That under that foreclosure one Warren G. Maxey was appointed receiver of, and became vested with, the property. That in January, 1897, a sale of the plant was made by the marshal under the foreclosure proceedings, wherein one Theodore C. Woodbury purchased and became the owner of the plant and contract with the city. That this sale was confirmed by the court. That said Woodbury was then, and still is, a citizen of the State of Maine, and entitled to bring this action.

That afterwards, on January 27, 1897, said Woodbury sold and transferred to the plaintiff, also a citizen of the State of Maine, all his interest in and to the contract and the waterworks plant constructed under it by successive owners, and that the plaintiff is now the lawful owner and holder of the same, and entitled to maintain the action.

Under this state of facts it is claimed by the defendant that under the above clause of the jurisdiction act this court has no jurisdiction, in that, though the requisite citizenship exists between the plaintiff and defendant, the transfer to the Portage City Waterworks Company, who were citizens of Wisconsin, prevented any subsequent holder, though a citizen of another State, from maintaining the action in the Federal Court, and that the case comes within the prohibition and exception of the statute. It is true that the Portage City Waterworks Company, as well as the receiver, was a citizen of Wisconsin, with the defendant, but the original contracting parties, who owned the franchise and contract, were citizens of New York, and competent to sue in the Federal Court. This being the case, the assignee of the receiver, who was a citizen of Maine, and who purchased the property, could also bring action in the Federal Court. The statute says the court shall not have cognizance in favor of any assignee unless the suit might have been prosecuted in such court if no assignment had been made. Clearly, if no assignment had been made of the contract, the original contractees, who were citizens of New York, could have come into the Federal Court to sue upon the contract. That being the case, there is no reason why the present holders of the contract may not, so long as the requisite citizenship exists to give the Federal Court jurisdiction. This statute, or the ones of a like character preceding it, has been often before the courts for construction; and it has never yet been held, either by the Supreme Court, or, I think, by any Circuit Court, that if these conditions existed the action could not be maintained, because the plaintiff must trace his title through some intermediate assignee, who could not have maintained the action. All the cases go upon the assumption that the intention of the law was to deny jurisdiction only in case the original payee or contractee was a citizen of the same State with the defendant, and so could not maintain the action in the United States courts. If the requisite citizenship existed between the original parties to the note or contract, so that suit might be maintained by the payee in the Federal Court, any subsequent holder could maintain the action, provided he was

also a resident of a State other than that where the party defendant resided. This, I think, is as far as the cases go. The purpose of the law was to prevent colorable assignments for the purpose of giving jurisdiction by payees or contractees who were citizens of the same State with the other contracting party. But this purpose does not hold when by the original contract the suit might be brought in the Federal Court.[1]

PAIGE v. TOWN OF ROCHESTER.

Circuit Court, D. Vermont. 1905.

137 Fed. 663.

WHEELER, District Judge.—According to the bill, the White River Valley Electric Railroad Company was chartered to build a railroad from Rochester to Bethel, was organized, and solicited subscriptions and aid for building its road. The defendant town, pursuant to the laws of the State, voted to aid the project.[2]

Subscriptions were made and aid was voted sufficient, with this, to apparently warrant commencement of work. The road was built part way, the corporation failed, and a receiver of it was appointed by this court with authority to complete the road, which was done in considerable part by the assignment of this subsidy to a contractor, who assigned it to the plaintiff Williams, to secure him for funds furnished by him for the prosecution of the work, of which the defendant was notified; and an interest in it has since been assigned to the plaintiffs Jose and Stiles, of which the defendant has also been notified. The bill is brought for the recovery of the subsidy, and is demurred to for lack of jurisdiction and want of equity.

The statutes of the United States have always provided that no District or Circuit Court should "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made," with some exceptions not here material. 1 Stat.

1 Only a portion of the opinion is reprinted.—Ed.

2 The statement of what the defendant town voted to do is omitted.—Ed.

78 c. 20, § 11; Rev. St. 629; 25 Stat. 434, c. 866, § 1. The argument in opposition to the jurisdiction is that the assignment of the receiver was that of the railroad corporation, which could not have maintained a suit against the defendant in this court, because it is a corporation and a citizen of the same state as the defendant. This would be true, and fatal to the jurisdiction, if the cause of action had accrued to the railroad corporation; but none would accrue, under the terms of the vote, until the road should be in operation. Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628. Before then the right to the subsidy was merely one to obtain it by building and equipping the road according to the terms of the vote. Williams as assignee had furnished the money by which this was accomplished, and the right to the subsidy accrued to him, for the benefit of himself, or the receiver, if he should redeem Williams' assignment, which has not been done. Williams' cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him by which by performance he acquired a chose in action to himself.[3]

HOLMES v. GOLDSMITH.

Supreme Court of the United States. 1892.

147 U. S. 150, 13 S. Ct. 288, 37 L. Ed. 118.

This was an action brought by L. Goldsmith and Max Goldsmith, doing business as partners under the name of L. Goldsmith & Co., citizens of the State of New York, against M. B. Holmes, John Dillard and R. Phipps, citizens of the State of Oregon, as makers of a promissory note, in the words and figures following:

[3] For other cases in which it was held that no assignment of a chose in action was involved, see Jewett v. Bradford Sav. Bank & Trust Co., 45 Fed. 801 (1891) proceeding in equity to compel the transfer of corporate stock; Wachusett Nat. Bank v. Sioux City Stove Works, 56 Fed. 321 (1893) payee mere agent to transfer; Smith v. Packard, 98 Fed. 793, 796-797, 39 C. C. A. 294, 298-299 (1900) state statute called plaintiff an assignee; Adams v. Shirk, 105 Fed. 659, 663, 44 C. C. A. 653, 657 (1901) lessor sued transferee of lessee; Stotesbury v. Huber, 237 Fed. 413, 416 (1916) assignee of share of estate; Menasha Wooden Ware Co. v. Southern Oregon Co., 244 Fed. 83, 87, 156 C. C. A. 511, 515 (1917) action to recover money paid for taxes.

But see Sere v. Pitot, 10 U. S. (6 Cranch) 332, 334-336, 3 L. Ed. 240, 241 (1810); Brainerd, Shaler & Hall Quarry Co. v. Briee, 250 U. S. 229, 39 S. Ct. 458, 63 L. Ed.—(1919).—Ed.

"$10,000. Portland, Oregon, Aug. 9, 1886.

"Six months after date, without grace, we, or either of us, promise to pay to the order of W. F. Owens ten thousand dollars, for value received, with interest from date at the rate of ten per cent per annum until paid, principal and interest payable in U. S. gold coin, at the first National Bank in Portland, Oregon, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

"M. B. Holmes,
"John Dillard,
"R. Phipps."

On the day of its date, W. F. Owens endorsed the note, waived, in writing, demand, notice and protest, delivered the note, so endorsed, to the agent of the plaintiffs, and received the sum of ten thousand dollars.

The complaint alleged that the transaction was a loan by plaintiffs to W. F. Owens; that the defendants executed the note for the accommodation of Owens, to enable him to procure the loan thereon; and that Owens was, in fact, a maker of said note to the plaintiffs, and never himself had any cause of action thereon against the defendants.

To this complaint the defendants demurred, on the ground that it did not bring the case within the jurisdiction of the Circuit Court, and did not state facts sufficient to constitute a cause of action.

Upon argument this demurrer was overruled. 36 Fed. Rep. 484. The defendants answered, denying the execution of the note, and knowledge of the other facts alleged in the complaint. At the trial a verdict was given in favor of the plaintiffs for the amount of the note, with interest from date, and on June 19, 1889, judgment was entered on the verdict, in favor of the plaintiffs and against the defendants, for the amount of the note with interest and with costs and disbursements.

A writ of error was duly sued out and allowed, and the case brought into this court for review. * * *

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The complaint alleges the ownership in the plaintiffs of a chose in action; as to the character, a promissory note; as to amount, ten thousand dollars; as to parties, the plaintiffs, citizens of [illegible]

State of New York, and the defendants, citizens of the State of Oregon; thus bringing the case within the jurisdiction of a Circuit Court of the United States, as defined in the Constitution.

By the demurrer to the complaint the defendants invoked the provision of the Act of August 13, 1888, 25 Stat. 433, 434, c. 866, which is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

Upon the face of the complaint, the jurisdiction of the Circuit Court was duly made to appear, so far as the requisitions of the Constitution apply. But it has been held, in a series of cases beginning with Turner v. Bank of North America, 4 Dall. 8, that it is competent for Congress, in creating a Circuit Court and prescribing the extent of its jurisdiction, to withhold jurisdiction in the case of a particular controversy.

In pursuance of this view it has been frequently held by this court that, in an action in a Circuit Court of the United States, by an assignee of a chose in action, the record must affirmatively show, by apt allegations, that the assignor could have maintained the action. * * *

The defendant in error contends that[1] he can maintain his action by alleging and proving that the nominal endorser was not really such, but that the note was made by the makers for his accommodation and as his sureties; that he was, in legal effect, a maker of the note; that he received the proceeds of the loan effected through the note, and had no right of action against the nominal makers of the note; and, hence, that he cannot be regarded as an assignor of a right of action against the makers, within the true meaning of the judiciary act.

The learned judge who tried the case below adopted the view that where it is necessary, to maintain the jurisdiction of the Circuit Court in an action on a promissory note, to show that the plaintiff, who appears to be an endorsee or assignee, is in point

[1] The wording at this point is slightly changed to make the sentence plain, since the actual wording refers to a portion of the opinion which is omitted, and would thus be confusing.—Ed.

of fact the payee of the note, it may be done, and therefore overruled the demurrer.

Against this view of the case, the plaintiffs in error urge two propositions; first, that it was not competent for the holders of the note to show, by allegations and evidence, that the relation of the parties to the note, as makers and payees, was otherwise than as it appears to be in the phraseology of the note itself; and, second, that, assuming the plaintiffs' evidence to truly present the facts of the case, yet the plaintiffs were not thereby relieved from the operation of that provision of the law which forbids assignees from maintaining actions to recover the contents of promissory notes. To sustain their first objection, plaintiffs in error cite numerous cases going to show that parol evidence is not admissable to vary the contract of endorsement, or the agreement of the parties as fixed under the law by the fact of endorsement.

Certainly, as against a third party who has become, in good faith, the holder of a promissory note, a defendant, whether a maker or an endorser, will not be permitted to escape from the legal import of his formal contract by an offer of parol evidence. But, as between themselves, it has always been held that evidence showing the real relation of the parties is admissable, because it does not change or vary the contract, but shows what it really was. The defendants' engagement, as to amount and date and place of payment, and every other circumstance connected with it, is left by the evidence just what it appears to be on the face of the note.

In Brooks v. Thatcher, 52 Vermont 559, where there was a question as to whether a party to a note was principal or surety, REDFIELD, J., said: "But the real relation of the parties to a written instrument, whether as principal or sureties, may always be shown by parol evidence."

Harris v. Brooks, 21 Pick. 195, 197, was a suit wherein one of two makers of a note was permitted to show that, though a joint maker in form, he was, in fact, surety for the other maker, and had been released by an agreement of the holder that he would look to the principal; and SHAW, C. J., said: "The fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption."

If, then, it was satisfactorily shown that Owens, the nominal endorser, was really the party for whose use the note was made, and that the plaintiffs below were the first and only holders of

the note for value, the next question is whether, upon that state of facts, they were prevented, by the terms of the judiciary act, from maintaining an action in the Circuit Court.

"It is quite plain the the plaintiffs' action did not offend the spirit and purpose of this section of the act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Court.

Bank of Kentucky v. Wister, 2 Pet. 318, 326, was the case of a suit in a Circuit Court of the United States by a holder of a bank bill payable to individuals or bearer, concerning which individuals there was no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But the court held, "this is a question which has been considered and disposed of in our previous decisions. This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

In Bushnell v. Kennedy, 9 Wall. 387, 391, Chief Justice CHASE, in delivering the opinion of the court, said: "It may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors."

We do not overlook the fact that, since the foregoing cases were determined, Congress has, in the more recent judiciary acts, still further restricted the jurisdiction of the Circuit courts by including in the prohibitory clause the case of promissory notes payable to bearer.

But the reasoning remains applicable in so far as they hold that the language of the statute is to be interpreted by the purpose to be effected and the mischief to be prevented.

We think that the jurisdiction of the Circuit Court, in the case

before us, was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his endorsement, assign or transfer any right of action held by him against the accommodation makers.[2]

INSURANCE COMPANY v. DUNHAM.

Supreme Court of the United States. 1870.

78 U. S. (11 Wallace) 1, 20 L. Ed. 90.

MR. JUSTICE BRADLEY delivered the opinion of the court. * * *

First, as to the locus or territory of maritime jurisdiction; that is, the place or territory where the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide. "Are we bound to say,"—says Justice WAYNE, delivering the opinion of the court in Waring v. Clarke,[1]—"Are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that sea always means high sea or main sea? * * * Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? * * * We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtility which is found in the arguments of their adversaries."

It was a long time, however, before the full extent of the ad-

2 Only a portion of the opinion is reprinted.—Ed.

1 5 Howard, 462.

miralty jurisdiction was firmly established. The judiciary act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burden as well as upon the high seas, thus at once ignoring the English rule; but for sometime it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of The Genesee Chief,[2] decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney,[3] "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case.

In Menetone v. Gibbons,[4] Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that

[2] 12 Howard, 443.
[3] Id. 457.
[4] 3 Term, 269.

case there happened to be a seal on the bond, of which a strong point was made. Justice BULLER answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on the subject-matter." Had these views actuated the common law courts at an earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of The New Jersey Navigation Company v. Merchants' Bank,"[5] which was a libel in personam against the company on a contract of affreightment to recover for the loss of specie by burning of the steamer Lexington on Long Island Sound, Justice NELSON, delivering the opinion of the court, says:[6] "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. * * * On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." (The last distinction based on tide, as we have seen, has since been abrogated.) Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship-carpenters and material-men on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England.[7] In the subsequent case of Morewood v. Enequist,[8] decided in 1859, which was a case of charter-party and affreightment, Justice GRIER, who had dissented in the case of The Lexington, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this

[5] 6 Howard, 344.
[6] Ib. 392.
[7] See cases cited by Justice Nelson, 6 Howard, 390, 391.
[8] 23 Howard, 493.

subject and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.' " He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of The Lexington, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either in rem or in personam." The case of The People's Ferry Co. v. Beers,[9] being pressed upon the court in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract made on land and to be performed on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is not a maritime contract;" but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases.

In the case of The Moses Taylor,[10] it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of The Belfast,[11] it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: * * * "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality."

It thus appears that in each case the decision of the court and

9 20 Ib. 401.
10 4 Wallace, 411.
11 7 Wallace, 624.

the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject-matter of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.[12]

CAMPBELL v. H. HACKFELD & CO.

Circuit Court of Appeals, Ninth Circuit. 1903.

125 Fed. 696, 62 C. C. A. 274.

ROSS, Circuit Judge.—This cause comes here on appeal from a decree of the District Court for the District of Hawaii sustaining an exception of the appellee to the jurisdiction of the court over the parties or the cause of action stated in the libel, and dismissing the libel, without prejudice, for want of jurisdiction.

The libelant was a stevedore, and the libelee a corporation engaged in the business of loading and unloading vessels at Honolulu. The libel shows that in pursuance of its business the libelee on the 26th day of July, 1902, undertook to unload a cargo of coal from the Norwegian bark Aeolus, then anchored in navigable waters of the port of Honolulu, and that the libelant was one of the libelee's employes engaged in that work; that while so engaged in the hold of the vessel the libelant was, by reason of the carelessness of the libelee and of other of its employes, severely injured, for which injury he asked damages. Not only does the libel fail to allege anything against the ship, its owner, officers, or crew, but it affirmatively alleges "that the persons who were engaged in the unloading of said bark Aeolus, were all employes of said defendant, and not members of the crew, or employes of said bark Aeolus, and not fellow servants of any capacity with any of the employes of said bark Aeolus."

Instances are numerous in which stevedores have maintained

12 Only a portion of the opinion is reprinted.
No attempt is here made to give more than a glimpse of the problems of admiralty jurisdiction.—Ed.

libels for injuries sustained by reason of defective machinery or appliances of the ship, or by reason of the negligence of its owner or of some of its officers or crew. Many of such cases are referred to in The Anaces, 93 Fed. 240, 34 C. C. A. 558, and in the briefs of counsel in the present case. But no case has been cited, and it is asserted by counsel that no case can be found, where a stevedore was allowed to maintain in a court of admiralty an action for damages, against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one or more of his other employes. The mere fact that no such case can be found in the book tends strongly to show that they are outside the acknowledged limit of admiralty cognizance over marine torts, for it would be little short of absurd to suppose that there have not been hundreds and hundreds of instances where stevedores have been injured in their work through the negligence of the contracting stevedore or of some of his employes. The Plymouth, 3 Wall. 30, 37, 18 L. Ed. 125; The Queen v. Judge of the City of London Court, Q. B. Div., vol. 28, 1892, pp. 273-298.

The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with nonmaritime affairs. In concluding his great opinion in the case of De Lovio v. Boit et al., 2 Gall. 398, 474, Fed. Cas. No. 3,776, Judge Story said:

"On the whole, I am, without the slightest hesitation, ready to pronounce that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts and injuries. The latter branch is necessarily bounded by locality. The former extends over all contracts, wheresoever they may be made or executed, or whatsoever may be the form of the stipulations, which relate to the navigation, business, or commerce of the sea."

Torts, as well as contracts, not maritime, are outside of admiralty cognizance.

It is quite true that in many of the decisions of the Supreme Court as well as of the Circuit Courts of Appeals and of the Circuit and Districts courts, the broad statement is made that in cases of tort the sole test of jurisdiction is locality; and that fact is made the basis of a criticism of the decision of the court below in the present case, found in the Harvard Law Review for January, 1903 (16 Harv. Law Rev. 210, 211), in which it is

said that that decision—"Infringes a rule which originated in the very nature of admiralty jurisdiction, and which has been satisfactory in its practical operation. This test has been all but universally regarded as the sole one. See The Plymouth, *supra.* The single authority to the contrary is the somewhat obscurely stated *dictum* of a text-writer. Benedict, *supra,* 308. The principal case seems, then, at variance with the spirit of the previous cases, even though reconcilable with the points actually decided. Not only would the adoption of its doctrine unsettle a rule which has long been assumed to be law, but it would make the question of jurisdiction over torts subject to the difficulty which so often perplexes cases of contract, namely, the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems, therefore, unfortunate, as increasing complication and uncertainty in the law, without, apparently, securing any practical gain to compensate for these disadvantages."

It is expressly admitted in this article that "in every instance which has been found, however, a maritime relation such as is required by the court" below, has in fact existed.

It is a cardinal, rule that the language of every court must be construed with reference to the case made for decision, and should not be extended so as to embrace cases that could hardly have been within its contemplation when using the language. Take, for instance, the expression of the Supreme Court in the case of The Plymouth, *supra,* in respect to the point in question, where it is said, "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." That language is quite as broad as, if not broader than, that used by any other court in any of the cases upon the subject, and, taken literally, would include within the jurisdiction of the admiralty court a very celebrated case that arose on the bay of San Francisco in the year 1870, when A. P. Crittenden, a distinguished lawyer of California, was shot by Laura D. Fair on board the ferry steamer El Capitan, while making one of her trips from the Oakland Mole to her slip at San Francisco. But we think it would surprise the Supreme Court to be told that by saying, as it did in the Plymouth Case, that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance" it in effect decided that such a tort as Mrs. Fair committed on Crittenden fell within admiralty cognizance. If the language of the courts to the effect that locality

is the sole test of admiralty jurisdiction in cases of tort is to be given the broad interpretation contended for by the appellant and by the Law Review referred to, then every case of battery committed by one passenger on another on board any ship anchored in navigable waters at any port or wharf is within the jurisdiction of the court having admiralty jurisdiction over the place. Such an interpretation is, in our opinion, wholly inadmissible, and such consequences very clearly show the danger of losing sight, in construing the language of a court, of the case about which it is speaking. In The Plymouth, for example, the case the court had for decision was one for damage done wholly on land, but in which the cause of damage originated on water within the admiralty jurisdiction of the trial court. There flames from a steam propeller anchored in the Chicago river set fire to some packing houses on land, and for the damage thus done it was sought to maintain a suit in the admiralty court. One of the arguments in favor of the jurisdiction was that the vessel which communicated the fire to the buildings was a maritime instrument or agent, and hence characterized the nature of the tort, and made of it a maritime tort. The court held that to be a misapprehension, and it was in answer to that contention that it said, "The jurisdiction of the admiralty over maritime torts does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters—where it occurred," and immediately added the clause heretofore quoted: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In this connection, we quote a few paragraphs from the opinion of Lord Esher, Master of the Rolls, delivered in a late case in England (hereinafter further referred to), where it was sought to maintain in a court of admiralty an action in personam against a pilot in respect of a collision between two ships on the high seas, caused by his negligence:

"It is said that there is a decision of Dr. Lushington in favor of the jurisdiction, and (merely to show the danger of taking words from a judgment without looking further) I will at once grapple with it. In The Sarah, Lush. 549, Dr. Lushington said at page 550: "The court has original jurisdiction, because the matter complained of is a tort committed on the high seas." There, it is said, in a declaration by Dr. Lushington, that he had jurisdiction over all torts committed on the high seas. That case

was decided in 1862; but if we turn to the earlier case of The Ida, Lush. 6, in which the subject-matter was the willful cutting of a bark adrift, whereby she capsized a barge which contained cargo, Dr. Lushington says at page 9: "The court, however, is still further indisposed to exercise jurisdiction on account of the peculiar nature of the act for which the plaintiffs are now trying to render the defendant's ship liable. The court, it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only." Therefore, by what he said in The Sarah, Lush. 549, he really did not mean every tort committed on the high seas, but only wrongful collisions; and he limited himself in The Ida, Lush. 6, by saying, in effect, that the jurisdiction of the admiralty had never extended to all torts on the high seas." The Queen v. The Judge of the City of London Court, Queen's Bench Division, vol. 28, 1892, pp. 273, 292.

In the case of Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90, the Supreme Court pointed out that it had frequently been decided by that court—"That the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England."

And as to contracts (the case then before the court) said:

"The English rule, which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea, and to be executed thereon (making locality the test), is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions."

The locality test was there discarded as to contracts, because, as the jurisdiction conferred on the United States courts "comprehends all maritime contracts, torts, and injuries," the true criterion in the case then before the court was, not the place where the contract was made, but the nature and subject-matter of the contract—that is to say, whether it had reference to maritime service or maritime transactions.

In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with

any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find. They are not only, in our opinion, based on sound reason, but also find support in Benedict's Admiralty (3d Ed.) § 308, where that learned writer says:

"Cases of torts on the high seas, *superaltum mare,* have always been held, even in England, to be within the jurisdiction of admiralty. And the jurisdiction in such cases has usually been held to depend upon locality, embracing only civil torts and injuries done on the sea, or on waters of the sea where the tide ebbs and flows. It depends upon the place where the cause of action arises, and that place must be the waters which are subject to the admiralty jurisdiction. It may, however, be doubted whether the civil jurisdiction, in such cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort."

In the case of The Queen v. The Judge of the City of London Court, *supra,* which is a very much stronger case in favor of the jurisdiction claimed than is the case at bar, Lord Esher, M. R., in considering on what, under the English law, does the jurisdiction of the admiralty court depend, said:

"It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespective of statute, a necessary condition for the jurisdiction of the admiralty court; but there is the further question, what is the subject-matter of that which has happened on the high seas? It is not everything which takes place on the high seas which is within the jurisdiction of the admiralty court. A third consideration is, with regard to whom is the jurisdiction asserted? You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint

is made. You must consider all these things in determining whether the admiralty court has jurisdiction."

The opinion of his lordship in the case cited is a very lucid and instructive one, and will well repay perusal.

We are of the opinion that the ruling of the court below was right, that it is not in conflict with any previous decision of which we are aware, and that it in no way tends to unsettle any rule of admiralty, or to introduce into that branch of the law any complication or uncertainty.

The judgment is affirmed.

THE JOSEFA SEGUNDA.

Supreme Court of the United States. 1825.

23 U. S. (10 Wheaton) 312, 6 L. Ed. 329.

One of the questions involved in this case is as to who had made a seizure of slaves.

It appeared, by the evidence, that Roberts, being employed as an inspector in a revenue boat at the Balize, near the mouth of the Mississippi, on the 18th of April, 1818, boarded the vessel, and declared that he had seized her. He, soon afterwards, went on shore, and put a person on board to take charge of the vessel, which remained at anchor opposite the block-house, until the 21st of April, when Lieutenant Meade, with six soldiers in a boat, went from Fort St. Philip, in company with a custom-house boat, and Mr. Gardner, an officer of the customs, on board, took possession of the vessel, and brought her up under the guns of the fort. It appeared, that Roberts, afterwards, came on board the vessel, but did not remain on board until her arrival at the city of New Orleans, he having left her in order to board another vessel in the river. On the 21st of April, Mr. Chew, the collector at New Orleans, acting on independent information which he had received, sent an armed revenue boat, with an Inspector of the Customs, down the river, with instructions to seize the vessel. On arriving at Fort St. Philip, they found the vessel at anchor opposite the fort, with a sergeant's guard on board, which had been placed there by Major Humphrey, the commanding officer at the fort. The inspector received from that officer the ship's papers, and

took possession of the vessel and negroes, the guard having been withdrawn, and brought them up to the city of New Orleans. Proceedings were commenced against the property at the instance of Mr. Chew, and the other officers of the customs, and though his name was not inserted in the libel, the prosecution was conducted by him until its final determination, and the other parties claiming as captors, or seizors, did not intervene until after the decree of this court on the appeal in the original cause.

The court below pronounced a decree, dismissing the claims of Messrs. Roberts, Humphrey, Meade, and Gardner, and allowing that of the collector and other officers of the customs, and the cause was brought by appeal to this court.[1]

Mr. Jutice Story delivered the opinion of the court. * * *

In respect to the claim of Mr. Roberts, we do not think that the evidence establishes that he ever made any valid seizure of the vessel. It is not sufficient that he intended to make one, or that, on some occasions, he expressed to third persons that he had so done. There must be an open, visible possession claimed, and authority exercised under a seizure. The parties must understand that they are dispossessed, and that they are no longer at liberty to exercise any dominion on board of the ship. It is true, that a superior physical force is not necessary to be employed, if there is a voluntary acquiescence in the seizure and dispossession. If the party, upon notice, agrees to submit, and actually submits, to the command and control of the seizing officer, that is sufficient; for, in such cases, as in cases of captures *jure belli,* a voluntary surrender of authority, and an agreement to obey the captor, supplies the place of actual force. But, here, Mr. Roberts gave no notice of the seizure to the persons on board; he exercised no authority, and claimed no possession. He had no force adequate to compel submission; and his appearance in the vessel gave no other character to him than that of an inspector, rightfully on board, in performance of his ordinary duties. To construe such an equivocal act as a seizure, would be unsettling principles.

Messrs. Humphrey, Meade, and Gardner, certainly did make a seizure, by their open possession of the vessel, and bringing her under the guns of Fort St. Philip. But there is this objection to the seizure, both of Mr. Roberts (assuming that he made one),

[1] The facts are restated and only a portion of the opinion is reprinted.—Ed.

and of the other persons, that it was never followed up by any subsequent prosecution or proceedings. The seizure of Messrs. Humphrey, Meade, and Gardner, seems to have been voluntarily abandoned by them; and even that of Mr. Roberts, if he made one, does not seem to have been persisted in. Now, a seizure, or capture, call it which we may, if once abandoned, without the influence of superior force, loses all its validity, and becomes a complete nullity. Like the common case of a capture at sea, and a voluntary abandonment, it leaves the property open to the next occupant. But what is decisive in our view is, that neither of these gentlemen ever attempted any prosecution, or intervened in the original proceedings in the District Court, claiming to be seizors, which was indispensable to consummate their legal right; and their claim was, for the first time, made after a final decree of condemnation in the Supreme Court. This was certainly a direct waiver of any right acquired by their original seizures. It is not permitted to parties to lie by, and allow other persons to incur all the hazards and responsibility of being held to damages in case the seizure turns out to be wrongful, and then to come in, after the peril is over, and claim the whole reward. Such a proceeding would be utterly unjust, and inadmissible. If the parties meant to have insisted on any right, as seizors, their duty was to have intervened in the District Court before the hearing on the merits, according to the course pointed out by Lord Hale in the passage cited at the bar, where there are several persons claiming to be seizors of forfeited property.[2] In the present case, Mr. Chew actually advanced a considerable sum of money for the maintenance of these negroes during the pendency of the suit; and if it had been unsuccessful he might have exclusively borne the loss. Upon the plain ground, then, that Mr. Roberts, and Messrs. Humphrey, Meade, and Gardner, have not followed up their seizure by any prosecution, such as the Act of 1807 requires, we are of opinion, that there is no foundation, in point of law, for their claims.

That Mr. Chew, on behalf of himself, and the surveyor and naval officer of the port of New Orleans, did make the seizure

2 Harg. Law Tracts, (4to.) p. 27. "At common law, any person might seize uncustomed goods to the use of the king and himself, and thereupon inform for a seizure. But yet, if A. seize goods uncustomed, and then B. seize them for the same cause, he that first seizeth ought to be preferred as the informer. And, therefore, if B., that seized after, first inform, and A. also inform, A. may be admitted to interplead with B., upon the priority of the seizure, before the merchant shall be put to answer either."

on which the prosecution in this case was founded, is completely proved by the evidence; it is also admitted by the United States, in their answer to the libel of Messrs. Carricaberra, etc., the Spanish claimants, and is averred by Mr. Chew, and his coadjutors, in their separate allegation and answer to the same libel. While the vessel lay at Fort St. Philip, armed boats, under revenue officers, were sent down by him, with orders to seize her, and bring her up to New Orleans for prosecution, which was done accordingly.[3]

THE CITY OF MEXICO.

District Court, S. D. Florida. 1886.

28 Fed. 148.

LOCKE, J.—The only ground upon which a libel for prize can be sustained is that of a state of war. Prize only relates to or is connected with such a state or condition. A vessel captured for engaging in piratical aggression becomes a prize on account of the state of universal war presumed to have been declared by a pirate against commerce and human kind at large, which requires no reciprocal declaration from any nation. Whether piracy is considered as a name applied only to indiscriminate plundering and robbery, either upon the high seas or upon the coasts where the high seas are used as the basis of operation, where the *animus furnadi* is the distinguishing feature, as is expressed and held by President Woolsey, precluding the idea of a revolutionary or political sentiment, or whether there may be acts of piracy committed in following out the direct course of a revolutionary struggle, as is contended by Judge Brown in the recent case of The Ambrose Light, 25 Fed. Rep. 408, there must be some overt act either in committing or attempting some offense against the law

[3] In The Sarah, 21 U. S. (8 Wheaton) 391, 5 L. Ed. 644 (1823) Mr. Chief Justice Marshall said, "By the act constituting the judicial system of the United States, the District Courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure, on land, the Court sits as a Court of common law. In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the Court sits as a Court of Admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of the Vengeance (reported in 3 Dallas' Rep. 297), the Sally (in 2 Cranch's Rep. 406) and the Betsy and Charlotte (in 4 Cranch's Rep. 443) that the trial is to be by the Court."—Ed.

of nations, to give a piratical character to a vessel. An intent alone can never determine such a state of warfare as would justify the seizure of a prize. There is in this case nothing that can be characterized as an overt act of piracy or warfare, and the libel for forfeiture as prize must be dismissed.[1]

UNITED STATES v. HILL.

Supreme Court of the United States. 1887.

123 U. S. 681, 8 S. Ct. 308, 31 L. Ed. 275.

MR. JUSTICE WAITE delivered the opinion of the court.

This is a suit brought on the official bond of Clement Hugh Hill, as clerk of the District Court of the United States for the District of Massachusetts, for "not properly accounting for all moneys coming into his hands, as required by law, according to the condition of said bond." The bond was in the penal sum of $20,000, and in the original writ the damages were laid at $2,000. The bill of exceptions shows that the controversy in the suit was as to the liability of the clerk to account to the United States for moneys received by him in naturalization business. The questions involved are in many respects the same as in United States v. Hill, 120 U. S. 169, though in some important particulars the two cases differ.

Under the instructions of the court the jury found a verdict for the defendants on the 26th of July, 1887. On the 3d of August, and before judgment, the writ was amended, with leave of the court, by increasing the *ad damnum* from $2,000 to $20,000. Then, on the 24th of August, a judgment was entered in due form on the verdict, "that the plaintiff take nothing by the writ." To reverse that judgment this writ of error was brought, which the defendants now move to dismiss, because the value of the matter in dispute does not exceed five thousand dollars. * * *

The Attorney General insists:

1. That it does not appear legitimately on the face of this record that the amount due is less than the penalty of the bond; and,

[1] Only a portion of the opinion is reprinted.—Ed.

2. That this is a suit brought for the enforcement of a "revenue law" of the United States, and, therefore, this court has jurisdiction for the review of the judgment under § 699 of the Revised Statutes "without regard to the sum or value in dispute."[1]

The part of § 699 of the Revised Statutes which is relied on as giving us jurisdiction, notwithstanding the small amount involved, is the second subdivision, which provides for a writ of error without regard to the sum or value in dispute, upon "any final judgment of a Circuit Court * * * in any civil action brought by the United States for the enforcement of any revenue law thereof." The original statute, of which this is a reenactment, was passed May 31, 1844, c. 31, 5 Stat. 658, and is as follows:

"That final judgments in any Circuit Court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of duties due, or alleged to be due, on merchandise imported therein, may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon writs of error, as in other cases, without regard to the sum or value in controversy in such action, at the instance of either party."

Section 823 of the Revised Statutes provides that "the following and no other compensation shall be taxed and allowed to * * * clerks of the Circuit * * * Courts." "The following" here referred to is found in § 828, which prescribes the fees of a clerk. Thus far the legislation has reference only to the compensation to be paid a clerk for his services. But § 839 provides that the clerk shall be allowed to retain of the fees and emoluments of his office, for his personal compensation, a sum not exceeding $3,500 a year. Section 833 makes it his duty to report, semiannually, to the Attorney General, all the fees and emoluments of his office, and all necessary expenditures, with vouchers for their payment. Section 844 then requires him to pay into the treasury any surplus of such fees and emoluments which his return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

The precise question for decision is, whether this section, which provides for the payment by the clerk into the treasury of the surplus moneys received by him as the fees and emoluments of his office, is a "revenue law," within the meaning of that clause of § 699 which is relied on, and we have no hesitation in saying

[1] The part of the case dealing with the first objection of the Attorney General is not reprinted.—Ed.

that it is not. As the provision relates to the jurisdiction of this court for the review of the judgments of the Circuit Courts, it is proper to refer to the statutes giving jurisdiction to those courts to see if there is anything there to show what the term "revenue law," as here used, means. Looking, then, to § 629 of the Revised Statutes, we find that by the fourth subdivision the Circuit courts have been granted original jurisdiction "of all suits at law or in equity arising under any act providing for revenue from imports or tonnage," and "of all causes arising under any law providing internal revenue." And again, by the twelfth subdivision, "of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof." This clearly implies that the term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, Art. I, of the Constitution, "to lay and collect taxes, duties, imposts, and excises." This view is strengthened by the third subdivision of § 699, which gives this court jurisdiction, without reference to the value in dispute, of "any final judgment of a Circuit Court * * * in any civil action against an officer of the revenue, for any act done by him in the performance of his official duty." Certainly it will not be claimed that the clerk of a District Court of the United States is an "officer of the revenue," but there is nothing to indicate that the term revenue has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable "compensation," not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any "revenue law," properly so called, but out of a statute governing an officer of a court of the United States.

It follows that this is a case where our jurisdiction depends on the value of the matter in dispute, as that is not sufficient in amount, that the motion to dismiss must be granted. It is, consequently, so ordered.

Dismissed.[2]

[2] Compare Pettigrew v. United States, 97 U. S. 385, 386-387, 24 L. Ed. 1029 (1878).—Ed.

MR. JUSTICE SWAYNE in Inman Steamship Co. v. Tinker, 94 U. S. 238, 24 L. Ed. 118 (1876), said:

"Tonnage," in our law, is a vessel's "internal cubical capacity in tons of one hundred cubic feet each, to be ascertained" in the manner prescribed by Congress. Act of May 6, 1864, 13 Stat., pp. 70, 72; Rev. Stat. U. S. 804, § 4153. "Tonnage duties are duties upon vessels in proportion to their capacity." Bouv. Law Dict., "Tonnage."

The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: "Tonnage *(tonnagium)* is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV., c. 3; 6 Hen. VIII., c. 14," etc. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself."

ATHERTON MACH. CO. v. ATWOOD-MORRISON CO.

Circuit Court of Appeals, Third Circuit. 1900.

102 Fed. 949, 43 C. C. A. 72.

The complainant set forth in its bill assignments by which it obtained title to a patent. Then it stated by way of an anticipated defense, that the defendant claimed to have been assigned the right to the patent involved, and stated that, if such an assignment was made, it was invalid as against the complainant. It then asked for an injunction and an accounting, and that the pretended assignment be declared to be of no effect, and the record thereof canceled.

The defendant demurred, and the Circuit Court sustained the demurrer and dismissed the bill. The ground on which the demurrer was sustained was that the suit was not a suit at law or in equity arising under the patent or copyright laws of the United States, and that therefore the court had no jurisdiction of the case. The court held that the question whether the complainant was entitled to relief did not involve the consideration of any law of the United States, and that the title to the patent rested solely in contract, in the interpretation of which the general principles of equity and common law are applicable, and that as both

complainant and defendant are corporations of the State of New Jersey, and as such citizens and inhabitants of that State, it had no jurisdiction of the case.[1]

GRAY, Circuit Judge.—The act of Congress of 1870, as embodied in section 629 of the Revised Statutes, provides that the "Circuit courts shall have original jurisdiction as follows: * * * of all suits at law or in equity, arising under the patent or copyright laws of the United States." The jurisdiction thus conferred is exclusive. All questions, therefore, which concern the infringement or validity of, and the title to, patents granted under the patent laws of the United States, must be litigated in the Circuit courts of the United States. "It is perfectly well settled," however, "that where a suit is brought on a contract, of which a patent is the subject-matter, either to enforce such contract or to annul it, the case arises on the contract or out of the contract, and not under the patent laws." * * *

Where a bill in equity states a contract between complainant and defendant, and which it seeks to have set aside in order to pursue the defendant as an infringer, or where the bill states a contract between complainant and defendant, which it seeks to enforce, as giving complainant title to the patent, the case cannot be said to arise under the patent laws. In either case the court is called upon to administer the law of the contract, and not the patent law of the United States, or rights claimed under them. But, where the contract set up or stated is not between the parties of the suit, it is collateral thereto, and cannot, therefore, give character to the case as being on the contract, and not one arising under the patent laws. In the case before us the action was not brought to enforce a contract or to set aside a contract between defendant and complainant. In other words, it was not a suit upon a contract between the parties to the suit, within the scope of the decisions referred to. The appellee is mistaken in its contention that questions of title to patents, such as are raised in this case, cannot be questions arising under the patent laws of the United States, because they involve the derivation of title from a contract. The complainant in this case has stated in its bill that it is the owner of the patent in suit, and derives title through an assignment from the patentee. An averment of title in the complainant must nec-

[1] The facts which are to be found in the opinion of the court are restated, and the part of the opinion setting forth the facts, as well as other portions thereof, are omitted.—Ed.

essarily be made, and is the necessary foundation for all rights asserted or litigated by the complainant. It is an averment without which complainant has no proper standing in court. It matters not whether the title be that of the patentee, derived directly from the grant made by the Government, or that of an assignee of the patentee or the assignee of an assignee. In either case it is the statement of a prima facie qualification to institute the suit, and such title, whether direct to the patentee, or derivative from him by assignment or assignments, is the creature of the patent law, and not of the common law; and, whether admitted or attacked by the opposing party, the questions raised are raised under the patent laws, and are therefore, within the meaning of the Revised Statutes of the United States, justiceable in the Circuit courts.[2]

ROSS v. H. S. GEER.

Circuit Court, N. D. New York. 1911.

188 Fed. 731.

RAY, District Judge.—The parties are both residents and citizens of the State of New York. The complainant has a valid registered

[2] In the following cases it was held that the question involved was not one arising under the patent laws; Kurtz v. Strauss, 100 Fed. 800 (1900) specific performance of contract and cancellation of alleged forged assignment: H. C. Cook Co. v. Beecher, 172 Fed. 166 (1909) action to charge directors of corporation with payment of judgment obtained against the corporation for infringement of a patent; Vose v. Roebuck Weather-Strip & Wire Screen Co., 216 Fed. 523, 524-525 (1914) reformation of contract purporting to grant licenses under patents; Holt v. Indiana Manufacturing Co., 176 U. S. 68, 71, 20 S. Ct. 272, 273, 44 L. Ed. 374, 376 (1900) suit to enjoin taxes levied on patents and patent rights; Briggs v. United Shoe Co., 239 U. S. 48, 49, 36 S. Ct. 6, 60 L. Ed. 138 (1915) suit to enforce payment of royalties; American Well Works Company v. Layne and Bowler Company, 241 U. S. 257, 258-259, 36 S. Ct. 585, 586, 60 L. Ed. 987, 988-989 (1916) suit for damages to business caused by a threat to sue under the patent law; Odell v. F. C. Farnsworth Co., 250 U. S. 501, 39 S. Ct. 516, 63 L. Ed. — (1919).

In the following cases it was held that the question involved was one arising under the patent laws: Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 425-426, 61 C. C. A. 58, 59-60 (1903); Harrington v. Atlantic & Pacific Telegraph Co., 143 Fed. 329, 336 (1906); Excelsior W. P. Co. v. Pacific Bridge Co., 185 U. S. 282, 285-295, 22 S. Ct. 681, 682-686, 46 L. Ed. 910, 913-917 (1902); The Fair v. Kohler Die Co., 228 U. S. 22, 23-25, 33 S. Ct. 410, 411, 57 L. Ed. 716, 717 (1913); Healy v. Sea Gull Specialty Co., 237 U. S. 479, 35 S. Ct., 658, 59 L. Ed. 1056 (1915).

When jurisdiction of the district court is based upon the fact that the case arises under the patent laws the amount in controversy is immaterial, Swindell v. Youngstown Sheet & Tube Co., 230 Fed. 438, 440, 144 C. C. A. 580, 582 (1916); and there need be no diversity of citizenship, Bernardin v. Northall, 77 Fed. 849 (1897).—Ed.

trade-mark, "Trojan," duly registered after 10 years' appropriation and exclusive use. He applied it to an ice cream disher or spoon, dipper or ladle, for accurately measuring the amount of ice cream taken up thereby and so constructed as to remove the contents into another receptacle without adhering to the disher or spoon. It was also so constructed as to be easily and thoroughly cleansed. This spoon or ladle is of simple construction and has a distinctive and an attractive appearance. It was called and known as the "Gem." It was well known in the trade and known as of the complainant's make independent of the trade-mark, "Trojan," used or placed thereon, but especially when that name was found thereon. The complainant used this name "Trojan" on other goods of the same class made and sold by him.

Prior to the commencement of this action, the defendant, or the company who manufactures, the defendant being a dealer only, it is said, commenced manufacturing and selling an ice cream dipper, spoon, disher, or ladle, used for the same purpose, and which, as to the bowl and some of its parts, resembled the spoon of the complainant. This had: "Clipper Disher, Pat. Feb. 7, '05. Geer Mfg. Co., Troy, N. Y."—on the handle. A later one, more nearly resembling complainant's spoon or disher, had on the handle: "New Clip Disher, Pat. Pend. H. S. Geer Co., Troy, N. Y." Later, and before the commencement of this suit, the defendant put out another dipper or ladle approaching very much nearer to the general form, construction, and appearance of the complainant's spoon or disher, and on the handle of this defendant put the words, "Trojan Disher," and on the reverse side, "H. S. Geer Co., Troy, N. Y." Later defendant put on the market an almost exact duplicate of the complainant's spoon or disher with the same marks, and later one that merely omitted the complainant's trake-mark on the dipper or ladle itself, but which when offered for sale and sold had on the box containing it the words: "Trojan Ice Cream Disher. Cup Shape. H. S. Geer Co., Troy, N. Y." And also, "Directions for cleaning Trojan Spoons."

The defendant was clearly infringing the complainant's trade-mark "Trojan" and was clearly making and selling a substantial duplicate of the complainant's dipper or ladle and taking a substantial part of his trade and injuring him in his business. The defendant's spoon or ladle as finally made and put on the market was such a close imitation or duplication of complainant's spoon or ladle that, regardless of the trade-mark, it would be easily taken and purchased for the spoon or ladle of complainant's make, and confusion did occur. In short, defendant by so making its spoon

or ladle in the form and style of complainant's and putting on the same the word "Trojan" was clearly passing off its spoon or ladle as that of complainant's make and intending so to do, and in so doing was not only guilty of infringement of the trade-mark, but of unfair competition in trade. The defendant's spoons or ladles were made by one process, and the infringement of the trade-mark and the construction were parts of one act and related to this one article. The single purpose of these acts was to get complainant's trade. The complainant brought suit alleging the facts and characterizing them as both infringement of the trade-mark and unfair competition in trade and applied for a preliminary injunction restraining or enjoining such acts which resulted in a single wrong and damages, viz., the impairment of complainant's trade by passing off on the public the spoon or disher of defendant's make as those of complainant's make. The injunction order was granted and has not, at this time, been appealed from. Thereupon, on the commencement of this action, the defendant wholly ceased to use the complainant's trade-mark, "Trojan," in any place or way. It did not longer place it on the spoon or ladle or on the package containing it or in its advertisements. In short, defendant ceased to infringe the trade-mark, but desires to make or to sell the dippers, spoons, or ladles made in such close imitation of complainant's dippers, spoons, or ladles as above described.

The injunction order contains a clause which enjoins the defendant from making or selling or offering for sale any dipper, spoon, or ladle made in such close imitation of the complainant's dipper, spoon or ladle as to deceive the public or cause the one to be taken or purchased as the other, etc.; in short, it enjoins the defendant from committing acts in the future in reference to this article which amount to unfair competition in trade with respect thereto, but which acts will not infringe the complainant's trade-mark inasmuch as what defendant proposes to do and desires to do will not use the word "Trojan" in any way. The dipper or spoon defendant desires to make is called "New Troy Cup Disher," instead of "Trojan."

Is the injunction broader, and more comprehensive than the facts justify, the power and jurisdiction of this court in the premises considered? As the parties are all citizens of the State of New York, this court has no jurisdiction of an action for unfair competition in trade pure and simple. It does have jurisdiction of an action between these parties for infringement of the trade-mark.

(1) If acts constituting infringement of a trade-mark and other

acts constituting unfair competition in trade are separate and independent acts, even though they all relate to the same article of manufacture, each set of acts constitutes a separate and a distinct cause of action, of one of which this court has jurisdiction and of the other of which it has no jurisdiction. In such a case this court could not take jurisdiction of the acts amounting to unfair competition only for the reason it has jurisdiction of the other separate and distinct acts amounting to infringement of a trade-mark. But when the wrongful acts are not separate and distinct, but are all done together as one whole, or one act, as was the case here, then the facts may be alleged and proved and the wrongful acts enjoined. The complainant should not be compelled to separate the one act into parts and allege and prove in the Circuit Court of the United States those parts of the act which constitute infringement of the trade-mark and allege and prove in the State court those parts of the same act which amount to unfair competition in trade, thus resorting to two tribunals to right one wrong, the impairment of his business by the diversion of a part thereof by another. The Circuit Court of the United States, having jurisdiction of the parties and of the subject-matter for the purpose of enjoining the infringement of the trade-mark, may also enjoin all wrongful acts done in connection with the infringement which augment and aggregate the wrong. Globe-Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 703, 56 C. C. A. 304; Siler et al. v. Louisville, etc., R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

In the Globe-Wernicke Case, *supra*, the court, LURTON, DAY, and SEVERENS, said:

"The bill was not founded on two separate matters or transactions. The conduct of the appellee complained of consisted of the same acts. The legal qualities of those acts were in some respect different, and the result was that the facts presented a double aspect. It is upon this consideration that such a bill can be sustained against an objection that it is multifarious."

(2) But can the court enjoin the doing of acts in the future not done in connection with and as a part of the infringement of the trade-mark or of an infringement thereof for the reason the same acts substantially have been done heretofore in connection with infringement of the trade-mark? If, having jurisdiction for one purpose, the court may retain and exercise jurisdiction for every purpose, still that purpose or those purposes must be to enjoin or restrain some act or acts done in connection with the acts creating the cause of action which gave the court jurisdiction.

But may the court extend its jurisdiction to and over future acts which have no connection with an infringement of the trade-mark? In short, I doubt that in this action the court can enjoin the doing of acts by the defendant in the future which, if done, will amount to unfair competition in trade only. Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 37, 41, 21 Sup. Ct. 7, 45 L. Ed. 60, is a case where the trade-mark was infringed and the shape of bottles and color of labels copied and the whole wrong was righted. In Saxlehner v. Eisner, 147 Fed. 189, 77 C. C. A. 417, the last headnote reads:

"That a corporation, and, through it, its officers, agents, and servants, had been enjoined from further infringing complainant's trade-marks, and from conducting a business campaign of unfair competition, did not preclude complainant from obtaining an injunction restraining certain of the officers in their individual capacity from performing such unwarranted acts."

As a condition of modifying the injunction, the defendant offers to give a bond to pay all damages, etc., awarded against it in the action and to keep an account of its sales. There will be an order modifying the injunction so as to permit the defendant to make and sell its ice cream dippers, ladles, or spoons which do not bear the word "Gem" or "Trojan" in any form or combination on the article itself or on the package or packages containing it and which are not advertised as the Trojan spoon, dipper, or ladle, provided it executes and files a bond to complainant in the sum of $5,000, conditioned to pay all costs and damages awarded against it in case the court finally holds that it has power in this action to enjoin the future making and sale of dippers or spoons of the character mentioned entirely disconnected from any infringement of the trade-mark "Trojan," and also keeps an account of its sales to be rendered to this complainant if directed so to do.

LOUISVILLE & NASHVILLE R. R. CO. v. RICE.

Supreme Court of the United States. 1918.

247 U. S. 201, 38 St. Ct. 429, 62 L. Ed. 1071.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Did the District Court rightly decide that it had no jurisdiction, is the only question presented.

Plaintiff in error sued to recover one hundred and forty-five

dollars claimed to be due under tariffs approved and published as required by Interstate Commerce Act, for disinfecting fifty-eight cars containing live stock shipped from points outside the State and delivered to defendant, the consignee, at New Orleans, Louisiana. It alleged presentation of bills covering each shipment and payment by defendant of all charges except those for disinfecting —two dollars and fifty cents per car.

Answering, defendant admitted the shipments were interstate; that he paid all lawful charges, except those sued for; and that these had been properly prescribed under and pursuant to the Interstate Commerce Act. But he denied liability for these reasons: As the carrier well knew, or should have known, he had long been engaged in the business of factor or commission merchant; in due course while acting as representative for their owners and consignors he received the live stock, sold them immediately upon arrival, deducted expenses, etc., and remitted balance of proceeds to his principals; when the cars arrived he paid all charges actually demanded; he was not then advised and remained unaware that any others were contemplated until such balance had been remitted. Having led him to believe the amount asked and paid before he remitted entire net proceeds constituted full settlement, the carrier is now estopped from demanding more of him.

The trial court upon its own initiative dismissed the action for want of jurisdiction.

Section 24 of the Judicial Code provides that regardless of amount involved District courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. Their duty and obligation grow out of and depend upon that act.

In support of the trial court it is said: There is no jurisdiction unless the suit in part at least arises out of a controversy in regard to operation or effect of the act of Congress. Here there is no dispute as to legality of rate or its application to the shipments; and consignee's liability was fully discharged upon payment by him of amount demanded at time of delivery and surrender of the carrier's lien.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress." Tennessee v. Davis, 100 U. S. 257, 264. "Whether a party claims a right under the Constitution or laws of the United States is to be ascertained by

the legal construction of its own allegations." Central R. R. Co. of New Jersey v. Mills, 113 U. S. 249, 257. "If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." The Fair v. Kohler Die Co., 228 U. S. 22, 25. A suit arises under an act of Congress when "it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U. S. 561, 569. As to interstate shipments "there can be no question that, since the decision in the Croninger Case (226 U. S. 491), the parties are held to the responsibilities imposed by the Federal law, to the exclusion of all other rules of obligation." St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, 243 U. S. 592, 595; Louisville & Nashville R. R. Co. v. Maxwell, 237 U. S. 94, 97.

The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act.

We think the District Court had jurisdiction. Its judgment is accordingly reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.[1]

HELWIG v. UNITED STATES.

Supreme Court of the United States. 1903.

188 U. S. 605, 23 S. Ct. 427, 47 L. Ed. 614.

The following question was certified to this court:

"Has the United States Circuit Court jurisdiction of an action to recover the aforesaid 'further sum' accruing 'in addition to the duties imposed by law,' under the provisions of section seven of the act of June 10, 1890, 26 Stat. 131?"[2]

[1] See also Wells Fargo & Co. v. Cuneo, 241 Fed. 726 (1917).
But see Banner v. The Wabash Railroad Co., 131 Ia. 405, 108 N. W. 759 (1906); Storm Lake Tub & Tank F. v. Minneapolis & St. L. R. Co., 209 Fed. 895, 898-904 (1913).—Ed.

[2] The rest of the facts are omitted, as is a portion of the opinion.—Ed.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

That part of section 7 of the Customs Administrative Act of 1890, 26 Stat. 131, 134, which relates to the question involved in this case is set forth in the margin.[3]

The sole question is whether the sum imposed by section 7, already quoted, is a penalty?

Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition

3 Sec. 7. * * * And the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws; and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive of evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence: Provided, That the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: And provided further, That all additional duties, penalties, or forfeitures, applicable to merchandise entered by a duly certified invoice shall be alike applicable to goods entered by a pro forma invoice or statement in form of an invoice. The duty shall not, however, be assessed upon an amount less than the invoice or entered value.

of the "further sum," in addition to the duties, provided for by the statute.

This case is a good illustration of the penal features of the statute. The aggregate value of the merchandise as entered by the importer was $13,252, and the amount of duty provided for by the statute (ten per centum) was $1,325.20. The final reappraisement made under section 13 of the same act was $16,792.20, and the duties, $1,679.20, the difference being $354; yet this difference in valuation between the importer and the appraisers, though the valuation of the importer was made without intent to defraud, brought upon him the imposition, under the statute, section 7, of the additional sum of $9,067.68, being the "further sum" spoken of in the statute in addition to the payment of the $354 of duty, which was demanded of the importer by reason of this difference. Now what can this be but a punishment, or, in other words, a penalty for undervaluation, whether innocently done or not? It certainly was no reward of merit, and whether called a "further sum" or an "additional duty" or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported, as to show beyond doubt that it was a sum imposed not, in fact, as a duty upon an imported article, but as a penalty and nothing else.

The statute also provides that, if the appraised value exceeds by more than forty per centum the value declared in the entry, then the entry value is presumed fraudulent and the whole property is to be seized by the collector, who is to proceed as in the case of a forfeiture, and the burden of showing that the undervaluation was not fraudulent is cast upon the importer. Now, whether the excess in valuation on the reappraisement is more or less than forty per centum of the value declared in the entry, seems to be important only upon the question of the presumption of fraud and the consequent forfeiture of the whole property. If more than forty per centum, the presumption of fraud is declared by the statute and the property is forfeited, unless the importer shows there was no fraud. If less, the sum imposed by the statute is to be paid, but the property is not forfeited. In the case of good faith, it is simply a less penalty than in the case of fraud. It is, however, argued that the error for undervaluation not fraudulent is repaired by imposing an additional duty on the particular goods in such invoice which have been undervalued, and there is no penalty, a simple enlarged duty upon merchandise, while in the other case, the presumed fraudulent undervaluation (if the

fraud be found), the whole of the merchandise is forfeited by the expressed terms of the statute.

Whether the error is repaired by imposing the sum named as an additional duty, is not material in the consideration of the nature of the imposition. It is still a punishment and nothing else, because of the carelessness, ignorance or mistake, without fraudulent intent, upon the part of the importer. If the fraudulent intent were present, the penalty would be enlarged and the goods forfeited. In both cases, the nature of the penalty is the same, only in one case it is satisfied by the imposition of a certain amount of money, while in the other a total forfeiture is demanded.

To the question, why the additional sum is imposed in the one case, or why the goods are forfeited in the other, there can be but one answer. It is because of the action of the importer with relation to the importation in question, and in one case such action calls down upon his head punishment by way of a money imposition, and in the other it is a forfeiture of his property. In either case there is to be punishment, either for carelessness or fraud.

Although the statute, under section 7, *supra*, terms the money demanded as a "further sum," and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the Government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act. Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty," if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum," or "an additional duty," will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging

simply from its language, to hold this provision to be other than penal in its nature. * * *

In Bartlett v. Kane, 16 How. 263, decided in 1853 under the statute of 1846, where the question of drawback arose, the additional duty of twenty per centum mentioned in the act was regarded as in the nature of a penalty. Mr. Justice CAMPBELL, in delivering the opinion of the court (at page 274), said:

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty. * * * It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the Government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice." * * *

We think the sum sought to be recovered in this action was a penalty, and the Circuit Court, therefore, had no jurisdiction. * * *

The question propounded by the Circuit Court of Appeals is answered in the negative, and it will be

So certified.[4]

DEBENTURE.

1 Words & Phrases (2nd Series) 1126.

A "debenture" is a certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned to an importer, for drawback of duties on merchandise imported and exported by him, provided the duties shall have been discharged prior to the time aforesaid. W. H. Thomas & Son Co. v. Barnett, 135 Fed.

[4] See also Rosenberg v. Union Iron Works, 109 Fed. 844, 845 (1901); Lees v. U. S., 150 U. S. 476, 478, 14 S. Ct. 163, 164, 37 L. Ed. 1150, 1150-1151 (1893).—Ed.

172, 172 (quoting and adopting definition in Bouvier's Law Dictionary).

DRAWBACK.

1 Bouvier's Law Dictionary (Rawle's 3rd Revision) 940.

An allowance made by the Government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. Goods can thus be sold in a foreign market at their natural cost in the home market. See U. S. R. S. tit. 34, C. 9.

CRAWFORD v. JOHNSON.

Circuit Court, D. Oregon. 1868.

6 Fed. Cas. No. 3,369, p. 777, 1 Deady, 457.

DEADY, District Judge.—From the complaint it appears, that on and prior to November 1, 1866, and ever since, the plaintiff was and has been collector of internal revenue for the district of Oregon, and that on or about said November 1, the plaintiff appointed the defendant Johnson, deputy collector of internal revenue for the sixth assessment district of Oregon, and that said defendant as principal, with the defendants Tapp and Smith as sureties, on said November 1, executed and delivered to the plaintiff, as collector aforesaid, a bond in the penal sum of $2,000, to be void upon the condition that said Johnson would faithfully perform the duties of deputy collector for the district aforesaid, etc.; and that the defendant Johnson failed to account for the sum of $1,978.42, of taxes placed in his hand for collection, but collected the same by virtue of his said office, and converted the amount to his own use, "for which sum the plaintiff is liable to account for and pay to the United States"; and that said plaintiff by reason of such failure, has been put to $21.58 expense, in addition to the sum aforesaid, for which sum of $2,000 he prays judgment.

A proviso to section 67 of the Act of July 13, 1866 (14 Stat. 172) provides: "That if any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property for or on account of any act by him done, under

any law of the United States, for the collection of taxes, he shall be entitled to maintain a suit for damages therefor, in the Circuit Court of the United States, in the district where the party doing the injury may reside or shall be found." Upon this proviso, counsel for plaintiff rests the jurisdiction of this court. On the argument, counsel for Smith practically abandoned the objection to the jurisdiction of the court. In this respect, the demurrer seems to have interposed upon the impression that the plaintiff relied upon a similar provision in section 2 of the Act of March 2, 1833 (4 Stat. 632), concerning "the collection of duties on imports," to support the jurisdiction of this court, and that such provision only applied to the collection of external revenue—duties on imports. But the proviso quoted from the Act of 1866, gives the same jurisdiction to this court in cases of actions for injuries arising from acts done under the internal law, as under the laws for the collection of duties on imports.

The objection that the complaint does not state facts sufficient to constitute a cause of action, is, I think, not well taken. True, the complaint only states that the plaintiff is liable to pay the money converted by his deputy, to the United States, and under ordinary circumstances a mere liability to suffer from the acts or omissions of another, does not give a right of action against such other. Some injury must actually result from such act or omission. A mere liability to be injured is not equivalent to an actual injury. But in this case, I think the plaintiff is more than merely liable to the United States for this money. The law makes him absolutely responsible for the conduct of his deputies, and also charges him with the whole of the taxes contained in the lists delivered to him for collection. Prima facie, the amount of the tax list is a fixed and ascertained indebtedness, for the payment of which he has given bond. This sum collected by Johnson, he is bound to pay. The condition of the bond is to keep the plaintiff harmless from any liability on account of any act or omission of Johnson's. In this respect the complaint follows the terms of the condition, and, so far as the bond is concerned, is a sufficient statement of a cause of action in any view of the matter. But it is doubtful if this court has jurisdiction of an action between these parties for a mere liability upon this bond, because the Act of 1866 limits the jurisdiction to cases where the officer or person shall receive an injury to his person or property. Instead of making the allegation of the complaint in the language of the bond, it would have been proper to have averred the fact to be, as it was

admitted on the argument, that the plaintiff had already paid over the amount to the United States. If so, he has received an injury to his property to that extent—he has lost so much of it on account of his act in appointing Johnson deputy collector of taxes. But I think it proper, under the circumstances, to hold, that as this amount of taxes was charged to the plaintiff by the Government, the money for the time being is to be considered as his own, and therefore taken or embezzled from him by Johnson, to his injury. The demurrer is overruled and judgment must be given for the plaintiff.[1]

Revised Statutes, Section 1980; U. S. Compiled Statutes, 1918, Compact Edition, Section 3933; U. S. Compiled Statutes, 1916 (Annotated) Section 3933; 1 Federal Statutes (Annotated) p. 796.

(1) Conspiracies; preventing officer from performing duties—First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Same; to intimidate party, witness or juror or obstruct justice—Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any man-

[1] The opinion only is reprinted.—Ed.

ner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Same; to deprive citizen of rights or privileges—Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.[1]

SIMPSON v. GEARY.

District Court, D. Arizona. 1913.

204 Fed. 507.

MORROW, Circuit Judge.—It is alleged in the bill of complaint that the complainants are citizens of the State of New Mexico;

[1] As to what rights and privileges one has as a citizen of the United States, see United States v. Sanges, 48 Fed. 78 (1891).

For the meaning of "citizen" as used in section 24, subdivision 12 of the Judicial Code and this statute, see Baldwin v. Franks, 120 U. S. 678, 690-692, 7 S. Ct. 656, 661-663, 30 L. Ed. 766, 770-771 (1887).

For the meaning of "conspiracy" as used in the same statutes, see U. S. v. Cole, 153 Fed. 801, 803-804 (1907).—Ed.

that the Atchison, Topeka & Santa Fe Railway Company is a corporation of the State of Kansas, and a resident and citizen of that State; that the other defendants are each residents and citizens of the State of Arizona. It is further alleged that the complainants are, and have been for a number of years, employed by the defendant the Atchison, Topeka & Santa Fe Railway Company, as porters upon the defendant's trains, and that they are also brakemen and flagmen on said trains; that by an act of the Legislature of the State of Arizona (Act of May 7, 1912; Session Laws of Arizona, p. 31) it is provided (section 3) that all passenger, mail, or express trains, composed of six or more cars, and operated outside of the yard limits, shall be equipped with and shall carry a crew consisting of not less than one engineer, one fireman, one conductor, one baggage master, one flagman, and one brakeman; that by section 8 it is provided that all flagmen mentioned in the act shall have had at least one year's experience as brakemen; that the defendant railway company has notified complainants that under said law they were not eligible for the positions of brakemen or flagmen, and the said defendant would become liable to the penalties prescribed by said statute should it retain complainants in its employ, and has notified complainants that it would have to replace them by others on December 1, 1912. It is alleged in the bill that each of the complainants receives a salary of $780 per year, amounting in the aggregate to $7,020 per annum. Complainants seek by the present bill to enjoin the defendants, as officers of the State, from enforcing the penalties prescribed by the act of Legislature complained of, against the defendant the Atchison, Topeka & Santa Fe Railway Company, if said defendant company does not discharge the complainants from its service, and to enjoin the railway company from discharging the complainants from their employment.

The Attorney General of the State of Arizona, appearing specially for all of the defendants other than the Atchison, Topeka & Santa Fe Railway Company, has interposed a motion to dismiss the bill of complaint on the ground that it appears upon the face of the complaint that this court has no jurisdiction of the cause. * * *

But the complainants contend that their case comes within the jurisdiction of the court under the provisions of the Fourteenth Amendment to the Constitution of the United States, and the fourteenth subdivision of section 24 of the Judicial Code. The

latter provides that District courts shall have original jurisdiction—"of all suits, at law or in equity, authorized by law to be brought by any person to redress deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

As the amount in dispute is not an element of jurisdiction under this statute, the complainants invoke the jurisdiction of the court without regard to that limitation contained in the first subdivision of section 24 of the Judicial Code.

If the case comes within this provision, it may be conceded that the limitation as to the amount in dispute does not apply. Does the case come within this statute? What are the civil rights here protected?

In Holt v. Indiana Manufacturing Co., 176 U. S. 68, 72, 20 Sup. Ct. 272, 273 (44 L. Ed. 374) the Supreme Court, referring to the provision of the statute under consideration, which was then the sixteenth subdivision of section 629 of the Revised Statutes (U. S. Comp. St. 1901, p. 506), and also to section 1979 of the Revised Statutes (U. S. Comp. St. 1901, p. 1262), said:

"All these provisions were brought forward from the Act of April 20, 1871, entitled 'An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.' 17 Stat. 13, c. 22. Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here."

That case was brought to enjoin the collection of certain personal taxes based upon an assessment upon the value of certain rights secured under letters patent of the United States. It was held by the Supreme Court that the Circuit Court did not have jurisdiction of the case. The term "civil rights" was not defined, nor was it necessary. The civil rights which it is the purpose of this statute to protect are only those rights, privileges, and immunities secured by the Constitution of the United States, or some law of the United States passed in pursuance of constitutional authority. Rights, privileges, and immunities not derived from the Federal Constitution, or secured thereby, are left exclusively to the protection of the States. Slaughter House Cases, 16 Wall. 36, 71, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 550, 551, 23

L. Ed. 588; Presser v. Illinois, 116 U. S. 252, 266, 6 Sup. Ct. 580, 29 L. Ed. 615; Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U. S. 263, 293, 12 Sup. Ct. 617, 36 L. Ed. 429.

The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any constitution. It is primarily a natural right, and it is only when a State law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the Federal Constitution can be invoked to protect the individual in his employment or calling.

The complainants' case is not within this protection. They have not been deprived of any of the equal rights of citizens or persons. The State law applies to all persons alike, without discrimination, whether citizens of the United States or persons within its jurisdiction, and it is plainly a regulation enacted under the police power of the State, having for its purpose the safety of passengers on the railways operating within the State.

In the late case of Chicago, R. I. & Pac. Ry. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 279 (55 L. Ed. 290), the Supreme Court had before it what is known as the "full crew" act of the State of Arkansas. The act provides for the equipment of freight trains upon substantially the same general principles as the Arizona act provides for the equipment of passenger trains. The railroad in that case raised the question of the constitutionality of the act on the ground that it undertook to regulate interstate commerce. The Attorney General of the State defended the act on the ground that it was a rightful exercise of the police power of the State. The court, in sustaining the constitutionality of the act as within the police power of the State, held that it was not too much to say that the State was under an obligation to establish such regulations as were necessary and reasonable for the safety of all engaged in business or domiciled within its limits. The court said further:

"Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal Court, unless they are clearly inconsistent with some power granted to the general government, or with some

right secured by that instrument, or unless they are purely arbitrary in their nature."

Under the authority of this case, it must be held that the Arizona statute is the rightful exercise of the police power of the State, and that this court has no jurisdiction of the case.

The temporary restraining order is therefore discharged, the motion for a temporary injunction denied, and the bill dismissed.[1]

JOHNSON v. JUMEL.

Circuit Court, D. Louisiana. 1877.

13 Fed. Cas. No. 7,392, p. 755, 3 Woods 69.

Billings, District Judge.—The substance of the petition is, that the petitioner was a candidate for the office of auditor of public accounts of the State of Louisiana at the election held on the 7th of November, 1876; that voters in various parishes who were entitled to vote were denied the right to vote at said election on account of race, color or previous condition of servitude, to the number of 10,000; that the officers known as the returning board were by law vested with complete jurisdiction to correct the errors and wrongs which had then arisen in these various parishes, and that they did make such corrections and returned the petitioner elected to said office; that he was duly commissioned and entered upon and enjoyed the possession of said office for the period of four months, when he was forcibly ejected by a government established by domestic violence, insurrection and revolution; that the claim or pretense upon which they have ousted him from his office is that the petitioner was not elected, and that the votes which were cast in the parishes in which the right to vote was denied should be counted against him. According to the allegations of this petition, petitioner has not been defeated or deprived of any election; but, on the contrary, was elected and was declared elected by the competent State authority, and was duly commissioned, and retained his office for the period of four months. True, there had been an unsuccessful attempt to defeat petitioner by an exclusion of votes in the various parishes, but he avers that that

[1] Only a portion of the opinion is reprinted.
See also Browner v. Irvin, 169 Fed. 964 (1909).—Ed.

attempt had been completely thwarted by the tribunal which had the final revision of the returns. Every vote that was cast, or was attempted to be cast, for the petitioner and against the defendant had, according to his allegations, full effect given to it, and was finally and effectively counted by the board of returning officers. He has thus, so far from having been defeated, succeeded in an election, and instead of having been deprived of an election, has secured an election, and four months after the election has been deprived, not of an election, but of an office, to which he has been elected and authoritatively declared elected; and he has been deprived of an office, not by the exclusion of votes for any reason, but by force, which took the proportions of a revolution. The statute under which jurisdiction is given to the Circuit Court is set forth in the Act of May 31, 1870, § 23 (16 Stat. 146; Rev. St. § 2010), as follows: "That whenever any person shall be defeated or deprived of his election to any office, except elector of president or vice-president, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens, who shall offer to vote, of the right to vote, on account of race, color or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial, and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote on account of race, color or previous condition of servitude, such suit or proceeding may be instituted in the Circuit or District Court of the United States of the circuit or district in which such person resides."

From this it appears that the cases in which the Circuit courts have jurisdiction of such actions as this are limited to those in which it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote, to citizens who so offered to vote, on account of race, color or previous condition of servitude, and that the jurisdiction of the Circuit Court is only given to the extent of determining the rights of the parties to such office, by reason of the denial of the right guaranteed by the fifteenth article of Amendment to the Constitution of the United States.

There is no doubt that the scope of this statute, under the limitations which it contains, extends from the first act required to be done in the matter of an election down to and including the final

and effective canvass of the votes by the officers who are charged with the duty of determining and certifying the result. If, in any of the stages of an election, in registration, in the receipt of votes, the certificates of the votes by the local authorities, or the final canvass of the votes or the certificate of election by the returning board, there had been such a denial of the right to vote as the statute contemplates, on account of race, color or previous condition of servitude, that matter this court would have had, under the act of Congress, jurisdiction to inquire into and adjudicate upon, and it could determine the rights of the parties to office, so far as they depended upon the denial of the right guaranteed by the fifteenth article of the Amendment to the Constitution. But the jurisdiction of the court begins and ends with the denial of the right to vote.

If, therefore, there is a preliminary exclusion or an exclusion at the polls, and that error is corrected by the proper State authorities and there is no final and effective exclusion of votes or discrimination, or if after an election has been held and the result reached and declared without discrimination or exclusion from any cause, the person elected is deprived of his office, then the statute closes the doorway upon the jurisdiction of this court. The defeat of a candidate at an election or his deprivation of an election, must be accomplished by the machinery of the election, in one of its stages, and must be contained in the result. If the election terminates in the success of the candidate, the essential ground of jurisdiction on the part of this court is wanting. The wrong which the petitioner sets forth is, that after being elected and installed, he has not been retained in the office. The object of the statute was to secure an election free from all possible exclusion on any of the specific grounds. It secured this object by giving to this court jurisdiction to correct, through this form of action, such exclusion effected by the machinery or practices attending the election. When, as the petitioner alleges, all this has been accomplished, and the very result aimed at by the statute has been worked out and declared, the statute gives no jurisdiction over a cause merely to enable a party to physically retain or regain an office to which he had a title established by an election, and from which he has subsequently been ejected. In this case the question by virtue of which the court could take jurisdiction, and by the terms of the statute it must be unmixed with any other question, is not presented. According to the allegations of the petition, the election had been completed for four months when the ouster took

place, and his loss of office is as independent of any denial of the right to vote as if he had been ejected by a government set up by a foreign invasion, claiming authority by the right of conquest.

Let the demurrer be sustained and the petition dismissed.[1]

FROMENT v. DUCLOS.

District Court, S. D. New York. 1887.

30 Fed. 385.

BROWN, J.—On the twenty-third of March last, suit was commenced in this court to recover the value of a bill of goods sold by the plaintiff in October, 1883, to the defendants; and on the same day an attachment was issued, pursuant to the State practice, against the property of the defendant Duclos, a resident of the State of New Jersey. The complaint and affidavit stated that the defendant Fritsch is the Austrian vice-consul at this port. The defendant Duclos now appears for the purpose only of vacating the attachment, on the ground that this court has no jurisdiction of an action against the consul and another defendant, but only in an action against the consul alone.

The seventeenth paragraph of section 563 of the Revised Statutes of the United States gives this court jurisdiction of "all suits against consuls or vice-consuls, except for offenses above the description aforesaid." The exception does not affect this case. The cases cited by the defendant to show that each of the defendants must be amenable to the jurisdiction of the Federal courts are all cases relating to suits "between citizens of different States," in which the language of the statute is quite different. See Rev. St. § 629; Strawbridge v. Curtiss, 3 Cranch 267; Coal Co. v. Blatchford, 11 Wall. 172. In those cases the jurisdiction of the Federal courts was never exclusive of the jurisdiction of the State courts. But the jurisdiction of the Federal courts over consuls and vice-consuls has always been exclusive of the State courts from the passage of the Judiciary Act of 1789 (1 St. at Large 76) until the Act of February 18, 1875 (13 St. at Large 318; Rev. St. U. S. § 711). See Bors v. Preston, 111 U. S. 252, 261, 4 Sup. Ct. Rep. 407.

[1] The opinion only is reprinted.—Ed.

Whatever may be the effect of the repeal of the exclusive jurisdiction of the Federal courts as respects consuls by the act last mentioned, that act cannot be construed as intended to diminish the jurisdiction of the United States District courts in actions affecting consuls as it existed before. There is no evidence of any such purpose, and it is not to be inferred. If such a suit as this was maintainable before the Act of February 18, 1875, it must therefore be held to be maintainable still. Looking at the question from this point of view, it would seem clear that the jurisdiction of this court in such a case as this should be maintained, whether a similar suit be now maintainable in the State courts or not.

There is no question that such a joint action as this is within the constitutional grant of the Federal power, since the Constitution expressly declares that this power "shall extend * * * to all cases affecting ambassadors, other public ministers, and consuls." This action is just as clearly also a "suit against a consul or vice-consul," and hence within the very language of the act of Congress (Rev. St. § 563), although a necessary co-defendant is joined. In the case of Davis v. Packard, 7 Pet. 276, 284, the Supreme Court, in referring to the privilege of a suit in the Federal tribunals, says that "the privilege is not a personal one," but is "the privilege of the country or Government which the consul represents. * * * It was deemed fit and proper that the courts of the Government with which rested the regulation of all foreign intercourse should have cognizance of suits against representatives of such foreign Governments." These reasons are as applicable to a joint action, including a consul defendant, as to an action against a consul sole defendant.

As the law stood until 1875, the jurisdiction of the Federal courts being expressly declared to be exclusive of the State courts, if suit upon a joint obligation could not be brought in this court against both defendants, the obligation could not have been enforced anywhere. In a State court the action against both could not lie, because suit against the consul there was forbidden; and, if the suit were brought there against the other defendant alone, the latter could successfully have pleaded the non-joinder of the consul as defendant; while in the Federal court the consul could not have been sued alone, since he would be equally entitled to plead the non-joinder of the other defendant. Barney v. Baltimore City, 6 Wall. 280, 286. The Act of February 28, 1839 (5 St. at Large 321, § 1; Rev. St. U. S. § 737), does not apply in regard to persons who are inhabitants of the district, or are found

therein, and that statute, therefore, would not extend to this case. It certainly was not the design of the judiciary act in giving exclusive jurisdiction to the District courts in suits against consuls, to debar suitors of all legal redress upon contracts in which a consul was a joint obligor. The necessary alternative is that suits against both jointly must have lain either in the Federal court, or else in the State court; and, as the general language of the statute excluded State courts, the reasonable construction of the phrase "all suits against consuls or vice-consuls" must be to apply it, in its general and extended sense, to all suits in which consuls or vice-consuls were necessary parties defendant.

In the case of Bixby v. Janssen, 6 Blatchf. 315, an action similar to this was brought and determined upon the merits; and, though the complaint was there dismissed as against third persons on the ground that the joint liability of the consul was disproved, the clear inference from the decision is that otherwise the suit would have been sustained.

The motion to vacate should be denied.[1]

POOLEY v. LUCO.

District Court, S. D. California. 1896.

76 Fed. 146.

This was a foreclosure suit brought by O. Pooley against Juan M. Luco and others. The cause was heard on demurrer to the bill for want of jurisdiction.

WELLBORN, District Judge.—This is a suit to foreclose a mortgage on lands situated in San Diego county, Southern district of California. One of the defendants, Juan M. Luco, is consul general of the republic of Chile, duly accredited to the Government of the United States, and resident at San Francisco, Cal. Said defendant by demurrer, challenges the jurisdiction of the court, and, in his brief, urges two grounds:

1. That so much of section 687 of the Revised Statutes of the United States as provides that the jurisdiction of the Supreme Court, in suits to which a consul is a party, shall not be exclusive,

[1] Compare Bixby v. Janssen, 3 Fed. Cas. No. 1,453, p. 488, 6 Blatchford, 315 (1869).

is in violation of the first clause of the second paragraph of section 2, art. 3, of the Constitution of the United States, said paragraph being as follows:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Defendant's argument is that the word "original," in this paragraph, is synonymous with "exclusive," and therefore Congress has no power to confer upon any other than the Supreme Court jurisdiction over a suit to which a consul is a party. This argument, while not so expressed in defendant's brief, also applies, of course, to subdivision 17 of section 563 of the Revised Statutes of the United States, which subdivision provides that the District courts shall have jurisdiction, with an exception not material here, "of all suits against consuls." Said subdivision, and the above-mentioned provision of section 687, are in my opinion, constitutional. The significance which defendant ascribes to the word "original" is not in harmony with its commonly accepted meaning, nor is it warranted by the context. In the paragraph of the Constitution above quoted, the word "original" is used solely in contra-distinction to the word "appellate," and this use indicates that the former of said words was not intended to make exclusive the jurisdiction which it otherwise qualifies.[1]

In Schunior v. Russell, 83 Texas 83, 18 S. W. 484 (1892), the court said, "A 'consul' is defined to be 'a commercial agent of a country residing in a foreign seaport, whose duty it is to support commercial intercourse of the State, and especially of the individual citizens.' 3 Amer. & Eng. Enc. Law 764."

In Reid Wrecking Co. v. United States, 202 Fed. 314 (1913), DAY, District Judge, said:

"The United States cannot be sued in their courts without their consent. In granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for their judicial

[1] Only a portion of the opinion is reprinted.—Ed.

determination, and the courts may not go beyond the letter of such consent. In Schillinger v. United States, 155 U. S. 163, 166, 15 Sup. Ct. 85, 86 (39 L. Ed. 108), Justice BREWER, in announcing the opinion of the court, said:

" 'Beyond the letter of such consent the courts may not go, no matter how beneficial they may be, or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.'

"The Supreme Court, in Reid v. United States, 211 U. S. 529, 29 Sup. Ct. 171, 53 L. Ed. 313, said:

" 'Suits against the United States can be maintained, of course, only by permission of the United States and in the manner and subject to the restrictions that it may see fit to impose.'

"It is evident from the holdings in these cases that the permission to bring suit against the United States as a sovereign power must be granted by Congress, and that the courts cannot enlarge upon the permission which has been granted by legislative authority. This being the law, the responsibility rests upon Congress, and the law as announced by Congress must be followed, regardless of the opinion of this court regarding its wisdom or its efficiency to meet certain conditions." [1]

HILL v. UNITED STATES.

Circuit Court, D. Massachusetts. 1889.

40 Fed. 441.

NELSON, J.—This is a suit to recover of the United States fees earned by the plaintiff as clerk of the District Court of the United States for the District of Massachusetts. (The facts showed that the amount due the plaintiff was over $10,000. He asked judgment for only $10,000).[2] * * *

The defendant excepted to the jurisdiction of the court upon the ground that the plaintiff's claim exceeded $10,000, within the

[1] The court, in determining whether or not the United States is being sued, will look to the real party in interest. Naganab v. Hitchcock, 202 U. S. 473, 26 S. Ct. 667, 50 L. Ed. 1113.—Ed.

[2] The facts are restated, and only a portion of the opinion is reprinted.—Ed.

meaning of the Act of March 3, 1887. (24 St. 505.) But, as the plaintiff in his petition limited his claim to $10,000, and expressly waived all right to recover a larger sum, the court overruled the exception, and decided that it had jurisdiction to hear and determine the case.

CARPENTER v. UNITED STATES.

Circuit Court, S. D. Ohio, W. D. 1891.

45 Fed. 341.

At Law.

Act. Cong. March 3, 1887, c. 359, § 1, provides that the Court of Claims shall have jurisdiction to hear and determine all claims founded upon "any contract, express or implied, with the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

SAGE, J.—After the ruling in this case (reported 42 Fed. Rep. 264), upon the suggestion of counsel for the plaintiff that the facts were imperfectly stated in the petition, the demurrer to which had been sustained, and that properly stated they would sustain a claim for indemnification by the Government, I permitted an amended petition to be filed, to which the Government answered, joining issue on the points hereinafter referred to. The cause is now before the court upon the pleadings and testimony submitted by the parties.

The first point made for the plaintiff is that the hiring of the flat by Mr. Carpenter for the use of the Government was legally authorized. The testimony does not establish that the flat was hired. It had been in possession of the plaintiff with the consent of Mr. Wolf, the owner, for another purpose. That purpose having been accomplished, the plaintiff, upon the order of Lieut. Mahan, took possession of it, and used it in the work of removing a wreck from the channel of the Ohio river, at a point a short distance below Pittsburgh. The plaintiff was then in the employment of the Government, under the orders of Lieut. Mahan, who

was subordinate to Col. Merrill. Col. Merrill had directed Lieut. Mahan to remove the wreck in question, which was an obstruction to navigation, and the plaintiff was assisting in that work. This was in the spring of 1873.

The next point for the plaintiff is that the hiring of the flat was reasonably necessary; and the third, that, the plaintiff having acquired possession of it on behalf of the Government, the Government became bound for its surrender, and for the performance of plaintiff's contract in its behalf with Wolf, the owner of the flat; that is, to take good care of it, to deliver it at the point agreed upon on the Ohio river, and to pay Wolf for its use. Counsel urge that it was not the plaintiff's affair, but the Government's; and, if the Government was in any respect in default, it was responsible to the owner for damages under the contract implied by the taking possession of and using the flat; also that, inasmuch as plaintiff was sued and compelled to pay damages by reason of his connection with the transaction as an agent of the Government, the Government must indemnify him.

The fatal objection to the plaintiff's claim is that he sues for indemnification, and presents as his evidence the record of the suit brought against him in the State Court at Pittsburgh. He seeks to recover the amount of the judgment therein rendered against him, with his expenses incurred in his defense. The Statute of Limitations would bar a recovery upon any other ground. But that suit was an action sounding in tort. It was begun on the 3d day of May, 1873, in the District Court of Alleghany County. A capias, styled in trover, was issued against the plaintiff and his co-defendants. It was followed by a declaration in "trespass on the case," as it is termed in the pleadings. The declaration, however, alleged the conversion of the flat by the defendants to their own use, and demanded damages therefor. The case proceeded to judgment for the sum of $874.78, with costs. On the 9th of October, 1885, nothing having been paid upon the judgment, the plaintiff was arrested, and imprisoned for 28 days; and on the 6th of May, 1886, having given bond for his release from imprisonment, he paid the amount of the judgment, and the costs thereon, in all $1,574.47, of which $26.30 were the costs. He also sets up that he has expended in attorney fees, and in the payment of expenses in his defense, $156.88; whereas he prays judgment against the Government for the sum of $1,731.74, with interest from May 6, 1886.

In U. S. v. Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. Rep.

306, which is cited for the plaintiff, it appeared that certain property, to which the United States asserted no title, was taken by its officers or agents, pursuant to an act of Congress, as private property for the public use, and it was held that the Government was under an implied obligation to make just compensation to the owner. In that case there had been no formal proceedings for the condemnation of the property to public use, but the owner waived any objection that he might have been entitled to make, based upon the want of such proceedings, and elected to regard the action of the Government as a taking under its sovereign right of eminent domain, and therefore demanded compensation for the property. The Supreme Court held that the United States, having by its agent, proceeding under the authority of a special act of Congress, taken the property of the claimant for public use, were under an obligation imposed by the Constitution to make compensation. The court said:

"The law will imply a promise to make the required compensation where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.' "

The court further said:

"If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the Government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

The radical difference between that case and the case now before the court is that there the plaintiff waived the tort, and based his claim upon the implied obligation of the Government, by reason of the provisions of the statute, to make compensation for the property. But here there is on the one hand no showing whatever of any contract with Wolf, the owner of the flat, under which possession was taken, for the contrary appears upon the face of the petition; and, on the other hand, there was no waiver

by Wolf of the tortious taking, but he prosecuted his claim for damages by reason of that taking.

In Langford v. U. S., 101 U. S. 341, the Supreme Court held that the court of claims has jurisdiction only in cases *ex contractu,* and that an implied contract to pay does not arise where the officer of the Government, asserting its ownership, commits a tort by taking forcible possession of the lands of an individual for public use. The court say that in such a case the Government or the officers who seize such property are guilty of a tort if it be in fact private property, and that no implied contract to pay can arise any more than in the case of such a transaction between individuals. With reference to the restriction of the court of claims to cases of contract, the court say that the reason therefor is that, while Congress might be willing to subject the Government to the judicial enforcement of contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one, and for such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. Precisely the restriction referred to in that case is placed upon the jurisdiction of this court by the act of March 3, 1887, under which this suit is brought.

In Gibbons v. U. S., 8 Wall. 269, the Supreme Court held that the Government is not liable on an implied assumpsit for the torts of its officer committed while in its service, and apparently for its benefit. The court said that it was not to be disguised that the case was an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts, and that no Government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents. Justice MILLER, in the course of his opinion, says that the language of the statutes which confer jurisdiction upon the court of claims excludes, by the strongest implication, demands against the Government founded on torts, and that the general principle already stated as applicable to all Governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their offi-

cers on the citizen, though occurring while engaged in the discharge of official duties. He further says that in such cases, where it is proper for the United States to furnish a remedy, Congress has wisely reserved the matter for its own determination, and that it certainly has not conferred it on the court of claims.

These authorities control the case now before the court, and in accordance with them the judgment will be for the Government, with costs.[1]

UNITED STATES v. McCRORY.

Circuit Court of Appeals, Fifth Circuit. 1899.

91 Fed. 295, 33 C. C. A. 515.

Pardee, Circuit Judge.—This is a suit brought in the District Court for the Northern District of Alabama, by the defendant in error, James T. McCrory, to recover compensation from the United States for services rendered as a letter carrier for time actually employed over and above eight hours per day. On the trial there was judgment against the United States for the sum of $253.21, the full amount claimed, and the United States sued out this writ of error. Subsequent to the rendition of the judgment and to the suing out of the writ of error, the following statute, restrictive of the jurisdiction of the Circuit and District courts in suits against the United States, was passed:

"Sec. 2. That section two of the act aforesaid, approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto to the end thereof the following: 'The jurisdiction hereby conferred upon the said Circuit and District courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.' " 30 Stat. 495.

This statute having been brought to our attention, two questions are presented: (1) Does the act quoted take away the jurisdiction of the Circuit and District courts in a suit brought by a letter carrier against the United States to recover compensa-

1 Compare Narciso Basso v. The United States, 40 Ct. Cl. 202, 215 (1905). See also section 146 of the Judicial Code.—Ed.

tion for services rendered? (2) What is the effect of the act in this court quoad the writ of error in this case?

It is argued that letter carriers are not officers of the United States, within the meaning of the statute in question, but are mere employes, not intended to be included in the statute. Letter carriers are appointed by the postmaster general under authority of the acts of Congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by Congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary. In U. S. v. Hartwell, 6 Wall. 385, 393, the Supreme Court declared that "an 'office' is a public station or employment conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties." In U. S. v. Germaine, 99 U. S. 508; Hall v. Wisconsin, 103 U. S. 5, 8; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449; U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505; U. S. v. Smith, 124 U. S. 525, 8 Sup. Ct. 595; and in Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103; U. S. v. Hartwell, *supra,* is cited with approval. An examination of these cases, all bearing on the question in hand, will show that, in the opinion of the Supreme Court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such a person is an officer of the United States; and that, within the constitutional meaning of the term. Letter carriers, therefore, are officers, within the meaning of the above-quoted statute, restricting the jurisdiction of the Circuit and District courts in regard to suits brought against the United States under the act of 1887.[1]

NOTE.

In U. S. v. Nipissing Mines Co., 206 Fed. 431, 124 C. C. A. 313 (1913), it was held that the Tucker Act of 1887, which contained

[1] Only a portion of the case is reprinted.
Compare United States v. Swift, 139 Fed. 225, 227, 71 C. C. A. 351, 353 (1905).
See also section 146 of the Judicial Code.—Ed.

a provision similar to section 24, subdivision 20 of the Judicial Code, did not allow an affirmative recovery against the United States on a counterclaim, but that the statute referred to original suits and prescribed procedure inconsistent with its use as the basis of counterclaim.

SECTION III.

REMOVAL OF CAUSES.

RAILWAY COMPANY v. WHITTON.

Supreme Court of the United States. 1871.

80 U. S. (13 Wallace) 270, 20 L. Ed. 571.

Error to the Circuit Court for the Eastern District of Wisconsin.

Henry Whitton, as administrator of the estate of his wife in Wisconsin, under letters of administration granted in that State, brought suit in 1866 in one of the State courts of Wisconsin to recover damages for the death of his wife, the same having been caused, as he alleged, by the carelessness and culpable mismanagement of the Chicago and Northwestern Railway Company.

The action was founded on a statute of Wisconsin, which provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this State, and, in some court established by the constitution and laws of the same."

There was a removal of the case to the Federal Circuit Court. One of the questions involved in this case is as to whether or not the removal was proper. * * *[1]

[1] The facts are restated, and only a portion of the opinion is reprinted.—Ed.

MR. JUSTICE FIELD, having stated the case, delivered the opinion of the court as follows:

The jurisdiction of the action by the Federal Court is denied on three grounds; the character of the parties as supposed citizens of the same State; the limitation to the State court of the remedy given by the statute of Wisconsin; and the alleged invalidity of the act of Congress of March 2d, 1867, under which the removal from the State court was made. * * *

Second; as to the limitation to the State court of the remedy given by the statute of Wisconsin. That statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect, or default of such person or corporation, contains a proviso "that such action shall be brought for a death caused in this State, and, in some court established by the Constitution and laws of the same." This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced.

It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the State. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the limits of the State. But when death does thus ensue from any of those causes the relatives of the deceased named in the statute can maintain an action for damages. The liability within the conditions specified extends to all parties through whose wrongful acts, neglect, or default death ensues, and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases, where a general right is thus conferred, it can be enforced in any Federal Court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal Court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal Court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by State leg-

islation, its enforcement by a Federal Court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.

This doctrine has been asserted in several cases by this court. In Suydam v. Broadnax,[2] an act of the Legislature of Alabama provided that the estate of a deceased person, declared to be insolvent, should be distributed by the executors or administrators according to the provisions of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases; but this court held, in a case not thus excepted, that the insolvency of the estate, judicially declared under the act, was not sufficient in law to abate a suit instituted in the Circuit Court of the United States by a citizen of another State against the representatives of a citizen of Alabama. "The 11th section of the act to establish the judicial courts of the United States," said the court, "carries out the constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States, and gives to the Circuit Court 'original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law and in equity,' etc., etc. It was certainly intended to give to suitors, having the right to sue in the Circuit Court, remedies coextensive with these rights. These remedies would not be so if any proceedings under an act of a State Legislature, to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court."

In The Union Bank of Tennessee v. Jolly's Administrators,[3] this court declared that the law of a State "limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State for the recovery of any property or money there to which they may be legally or equitably entitled." The same doctrine was affirmed in Hyde v. Stone,[4] and in Payne v. Hook.[5] * * *[6]

[2] 14 Peters, 67.
[3] 18 Howard, 506.
[4] 20 Howard, 170.
[5] 7 Wallace, 425.
[6] It was held that an agreement made in accordance with the terms of a Wisconsin statute, which provided that no foreign insurance company could

FIDELITY TRUST CO. v. GILL CAR CO.

Circuit Court, S. D. Ohio. 1885.

25 Fed. 737.

HAMMOND, J.—This bill was filed originally in the Court of Common Pleas of Franklin County to foreclose a mortgage. That court is the one of general jurisdiction in that county for such purposes under the laws of the State of Ohio. A demurrer was filed denying its jurisdiction, because it appeared by the bill that subsequently to the mortgage the mortgagor had made a general assignment of all his property for the benefit of his creditors; that the assignee had duly filed the assignment, given bond, and qualified as required by law in the Probate Court of the proper county. Pending that demurrer the cause was removed to this court by the plaintiff, where the demurrer upon the pleadings as they then stood was overruled by our Brother SAGE, and the parties were required to answer. The answer of the assignee shows that he was proceeding with all reasonable speed to administer his trust according to the requirements of the law in that behalf. The case is set down for hearing on the bill and answer.

The jurisdiction of this court is denied, and that is the sole question involved in the case as now presented. It is not denied that this court would have had original jurisdiction to maintain the bill, for it is conceded that neither by legislation nor otherwise can a State restrict or impair the jurisdiction of the Federal courts as established by the Constitution and laws of the United States, whether exercised by original process or by that of removal from the State courts. But it is said that where a cause is removed from a State court, the jurisdiction of the Federal Court over that particular suit is in a certain limited sense a derivative jurisdiction, so that if the State court have no jurisdiction over the subject-matter or the parties the Federal Court can have none, although it might by some other suit originally brought or re-

transact business in that state until it had promised not to remove any suit for trial into a Federal Court, was not binding. Insurance Company v. Morse, 87 U. S. (20 Wallace) 445, 453-459, 22 L. Ed. 365, 368-370 (1874).

But it has been held that a state statute, providing that the license giving a foreign corporation permission to do business in that state would be revoked, if it removed a case to a Federal Court, was constitutional. Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 S. Ct. 619, 50 L. Ed. 1013 (1906).—Ed.

moved acquire jurisdiction over the controversy between the parties, and I have no doubt that is the law.

There is some force in the argument that when the parties stand face to face in a court of competent jurisdiction to settle the controversy, it is not of material importance to inquire how they got there, nor whether some other court in another dominion would have had the power to try the case, and that our own jurisdiction over the subject-matter is that which concerns us, and not that of the court of common pleas. There is also force in the position that Congress intended, by the removal acts, as well as by the judiciary act conferring original jurisdiction over controversies between citizens of different States, to put in force in the most plenary manner the judicial power of the United States over such controversies, and to transfer them bodily at the request of either party into its own courts. This line of argument overlooks certain essential features of every jurisprudence, and subordinates to a general principle of undoubted soundness important rights of the parties connected with the details of every litigation concerning their controversies. Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a "suit" or "case" in court, the most important of which is, no doubt, that there shall be a tribunal authorized to issue that indispensable notice which we call a writ or process, to bring the parties together in the court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a "suit" or "case" which can only be when the tribunal undertaking the initiatory steps is duly authorized to do that thing and proceed with the matter of adjudging between the parties, either for itself or by transferring that function to some other tribunal, likewise duly authorized to proceed to judgment. Whatever may be said as to the proper definition of the term "suit" or "case" in other respects, in this process of inaugurating the procedure by which the controversy is to be judicially determined there must be, *ex necessitate rei*, a court having power to set in motion the machinery of the law, and this we call its jurisdiction over the subject-matter; while that effectual service of its notice which is legally potential to bring the parties before itself, or whatever proper tribunal may proceed further in the progress of the "case," we call its jurisdiction over the parties. Both must at some time concur to establish a lawfully constituted "suit" by which the controversy is to be adjudged, either in the court issuing the process or in any tri-

bunal to which it may be removed for judgment. The act of Congress does not provide for the removal of the controversy alone, and this separate and apart from the suit, but only "any suit of a civil nature, at law or in equity, now pending, or hereafter to be brought, in any State court, * * * in which there shall be a controversy between citizens of different States," etc. Act March 3, 1875, § 2 (18 St. 470).

Now, if a citizen of Pennsylvania, holding a promissory note made by a citizen of Ohio, on which he desired to bring suit, should go into a State court of exclusive criminal jurisdiction, file his complaint, sue out his writ of summons, have it served in the usual way, and then remove the controversy into this court, could it be pretended that we should retain the jurisdiction on the grounds urged here? I think not. All the forms of a suit would exist in appearance; a court, process executed, and pleadings adapted to the purpose, but there would be no "suit" in court any more than if the proceeding had been commenced in a moot court, such as are organized in law-schools to teach practice. I do not mean to say that we measure our jurisdiction wholly by that of the State court, and that nothing can be adjudged here which could not have been adjudged there; for cases can be well imagined where this ruling should be subject to qualification, but not in its essential requirements. It may be that over the controversy embodied in the suit we should have here a fuller power of judgment than was possessed by the State court; or, on the other hand, that court may have had a more enlarged power than has been given to us; and it may be that we should, as the case required, extend or restrict our adjudication, as by our own rule of judgment we should be compelled to do; but, still, the fundamental principle would co-exist with that state of circumstances, and we should have "a suit" pending in the State court in some other sense than that of mere form, and which could be removed here in some other sense than that of having a controversy over which our own jurisdiction was plenary, although the State court could have had none at all. The opinion I wish to express is confined to this; that wherever there is a total absence of jurisdiction over the subject-matter in the State court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the Federal Court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the parties. This is not a mere technical

necessity of the situation, but a matter of substantial right, which demands that before a defendant can be required to submit his case to any court the legal methods of procedure appointed by law must be pursued in constructing "the suit," which is made the vehicle for bringing the controversy into court. The plaintiff cannot bring the defendant into court in any way that suits his convenience or his whim, but must do it in the manner pointed out by law. If he choose to take action in a State court, and then remove the suit here, the plaintiff should have a care that the State court has the necessary jurisdiction to furnish the stock on which to graft our proceedings, whatever may be the outcome of a difference in the two jurisdictions.[1]

BUFORD v. STROTHER.

Circuit Court, D. Iowa. 1881.

10 Fed. 406.

LOVE, D. J.—The foregoing cases are now before us upon motions to remand the same to the State courts from which they were brought into this court. The motions to remand are all placed by counsel upon the same general grounds. It is insisted as to each of these cases that it is a proceeding supplemental to the original cause out of which it grew, and being a mere appendage to the judgment rendered in the original case it cannot be separated from the same and brought for adjudication here. These several motions may therefore be considered together.

There is no question of jurisdiction in any of these cases, as far as citizenship and the amount involved are concerned.

The first two causes are proceedings by garnishment. The plaintiff in these cases obtained judgments against the defendants in the State court, caused certain parties to be garnished, and having taken issue upon the answers of the garnishees, the plaintiff re-

[1] Only a portion of the opinion is reprinted.

"The method of procedure by which a suit is brought or instituted in a court of the state is merely formal and model, and in no wise effects the right of removal if in other respects the defendant possesses that right." City of Terre Haute v. Evansville & T. H. R. Co., 106 Fed. 545, 548 (1901).

Compare David Lupton's Sons v. Auto Club of Am., 225 U. S. 489, 493-495, 499-500, 32 S. Ct. 711, 712, 714, 56 L. Ed. 1177, 1179, 1181-1182, Ann. Cas. 1914 A. 699 (1912).—Ed.

moved the issues thus made for determination into this court. The original defendant and the garnishees now move to remand.

In the third case the plaintiff, a citizen of Wisconsin, obtained a judgment in the State court against an Iowa corporation, and having failed to obtain satisfaction of the judgment he seeks by this action to make the present defendants, who are stockholders in the corporation, liable, in pursuance of chapter 181, title 9, of the Code of Iowa. The plaintiff in the present action against the defendants, one of whom is a director and the other a stockholder in the corporation, sets out his judgment and the return of execution *nulla bona;* charges the defendants with certain alleged frauds to his injury within the provisions of the statute; and prays judgment for his damages. The plaintiff caused the proceedings against the stockholders to be removed into this court. The defendants move to remand to the State court.

What is the true principle applicable to this class of removal cases? By what rule or criterion may we determine whether or not a proceeding which is merely auxiliary to the main judgment or decree may be transferred from the State to the Federal Court? It is idle to say that a supplemental proceeding cannot be removed because it is an appendage or sequence of the original suit. This is, at best, but reasoning in a circle. It is as if one were to affirm that a supplemental proceeding cannot be removed because it is a supplemental proceeding. It is, in fact, substituting one form of words for another form of words. We must, if possible, find some other principle to guide our judgment in such cases. It seems to me that the true principle is this: Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceeding. But where the supplemental proceeding is not merely a mode of execution or relief, but where it, in fact, involves an independent controversy with some new and different party, it may be removed into the Federal Court; always, of course, assuming that otherwise the proper jurisdictional facts exist. Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process or by supplemental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter. It would, therefore,

be difficult to persuade us that Congress meant by the provision in the Act of 1875 for the removal of "suits of a civil nature" to authorize the transfer of controversies growing out of mere modes of execution and relief, thus directly interfering with the State courts in the execution of their own judgments. It is not in this sense that the words "suits of a civil nature" are ordinarily used.

Now, the process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands. The garnishment, therefore, is inseparably connected with the judgment. If money is realized it is to be applied to the satisfaction of the judgment. Suppose that an issue, taken upon the garnishee's answer, should be removed to the Federal Court (the original case remaining, as it must remain, in the State court), and suppose the Federal Court should deliver judgment against the garnishee, and by execution or otherwise the money should be collected, how could the Federal Court enter satisfaction, the judgment not being under its control? We see in this the embarrassment that must arise from the attempt to separate the garnishment proceeding from the judgment, the latter remaining in one court and the former carried to another and different court.

This branch of the rule is clearly illustrated by the case of Webber v. Humphreys, 5 Dillon 223. The motion in that case was manifestly a mode of execution. The plaintiff had a judgment against a Missouri corporation, and the State of Missouri provided substantially that upon a return of *nulla bona* the judgment creditor might, by motion, with due notice, obtain an order from the court for execution against a stockholder to an amount equal to the balance of his unpaid stock. Here the unpaid stock is treated as assets belonging to the corporation, and the statute provides the judgment creditor with a mode of execution to reach such assets. It was held by the Circuit Court for the District of Missouri that the motion could not be transferred from the State to the Federal Court, notwithstanding the fact that there was a new controversy between the plaintiff and a new and different party.

The other branch of the rule, that there can be no removal where the supplemental proceeding is a mode of relief inseparably connected with the original judgment, is illustrated by the case of Chapman v. Barger, 4 Dillon 557. In this case it was held that the proceeding under the occupying claimant law, for the value

of improvements after judgment in ejectment, cannot be removed to the Federal Court. In this class of cases the statute of Iowa provides a mode of relief after judgment for the occupying claimant. Upon the filing of his petition the execution of the original judgment is to be suspended. The value of the improvements is to be ascertained, and also the value of the land aside from the improvements. The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property. If the plaintiff fail to do this after a reasonable time to be fixed by the court, the defendant may take the property upon paying the value of the land aside from the improvements, etc. Now it is obvious that this relief is inseparably connected with the judgment in the main action. A court not having the judgment in the main action under its control, could not give to the parties the full measure of relief provided by the statute; for supposing the owner of the land should pay for the improvements, he would be entitled to an execution to put him in possession of the property, and a writ of possession could issue only upon the judgment in ejectment.

It is obvious, therefore, that the motion to remand the first two cases above named must be sustained.

As to the third case, it stands upon wholly different ground. The proceeding in this case is not in any sense a mode of execution or relief after judgment. It does not aim to reach assets of the corporation in the hands of a stockholder or director. It seeks no relief which is inseparably connected with the judgment against the corporation. The plaintiff in his petition charges the defendants, as stockholders and directors of the corporation, with certain fraudulent acts and representations within the terms of the 1071st section of the Code of Iowa, and prays judgment for damages as provided for in that section. The section is as follows:

"Intentional fraud, in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may recover damages therefor against those participating in such fraud."

Here is a distinct and independent cause of action given by the last clause of the section. The plaintiff's allegations are founded upon facts which he claims bring him within the terms of this section. The gravamen of his action is fraud, and he prays

judgment for damages. It may have been necessary for him to set out the judgment and show that an execution has been returned unsatisfied, to meet the conditions of the 1083d section, but the judgment is not the foundation of his action. He has a controversy with new parties distinct from that upon which the judgment was rendered. He seeks to establish a new liability against these new parties.

It is further argued by defendant that this action cannot be maintained here because it is in the nature of an action to enforce a statutory penalty. To this the answer is that it is not an action to recover penalties, but unliquidated damages. It is a civil, not a penal action. Its object is not punishment, but indemnity for a civil injury. It is to no purpose to say that the same section of the statutes provides for the punishment of the offense committed by the defendants as a crime. It is not unusual for the same statute thus to provide for indemnity by civil action to the individual injured, and protection to the public by penal action and indictment.

The motion to remand in this case is denied.[1]

GOLD-WASHING AND WATER CO. v. KEYES.

Supreme Court of the United States. 1877.

96 U. S. 199, 24 L. Ed. 656.

MR. JUSTICE WAITE delivered the opinion of the court. * * *

The attempt to transfer this cause was made under that part of sect. 2 of the Act of 1875 which provides for the removal of suits "arising under the Constitution or laws of the United States." In the language of Chief Justice MARSHALL, a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either" (Cohens v. Virginia, 6 Wheat. 379); or when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction" (Osborne v. Bank of the United States, 9 id. 822). * * *

[1] A good discussion, including numerous references to cases, of ancillary jurisdiction is to be found in 1 Foster Federal Practice (5th Ed.) pp. 142-151.—Ed.

A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from sect. 5 of the Act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, "at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."[1]

WEST v. AURORA CITY.

Supreme Court of the United States. 1867.

73 U. S. (6 Wallace) 139, 18 L. Ed. 819.

Error to the Circuit Court for Indiana.

The twelfth section of the judiciary act provides:

"That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, * * * and the defendant shall, at the time of entering his appearance, file his petition for the removal of the cause for trial in the next Circuit Court, * * * and offer good and sufficient surety for his entering appearance in such State court, on the first day of its session, and file copies of said process against him, * * * it shall be the

[1] The facts and part of the opinion are omitted.

See also Westbrook v. Director General of Railroads, 263 Fed. 211, 212-213 (1920).

When a legal question arising under the Constitution or a law or a treaty of the United States is decided by the Supreme Court, it ceases to be a federal question. Myrtle v. Nevada, C. & O. Ry. Co., 137 Fed. 193, 195 (1905).

But see Mallon v. Hyde, 76 Fed. 388, 388 (1896).

For cases dealing with questions as to when the suit is one of a civil nature at law or in equity, what the amount in dispute is, etc., see cases under section 24 (1) of the Judicial Code.—Ed.

duty of the State court to accept the surety and proceed no further in the cause, * * * and such copies being entered as aforesaid in such court of the United States, the cause shall proceed there in the same manner as if it had been brought by original process."

The code of Indiana also provides that in suits brought in that State:

"The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

With these statutory provisions in existence, West and Torrance, citizens of Ohio, brought suit in one of the State courts of Indiana against the City of Aurora, Indiana. The nature of their action did not clearly appear from the record, but it seemed to have been a suit, by petition, under the State code, against the city just named, for the recovery of the amount of the matured interest coupons of certain bonds.

To this suit the defendants seemed to have made defences by answer under the code, and subsequently to have filed, by leave of the court, as an additional answer, three paragraphs setting up new defensive matter, in each of which the defendant prayed an injunction to restrain the plaintiffs from further proceeding in any suit on the coupons or bonds, and from transferring them to any third parties, and for a decree that the bonds be delivered up to be cancelled.

Upon the filing of these additional paragraphs the plaintiffs entered a discontinuance of their suit, and, assuming that under the code the new paragraphs of the answer would remain, in substance, a new suit against them for the cause and object set forth in them, filed their petition for the removal of the cause into the Circuit Court of the United States. The petition was allowed by the State court, and the new paragraphs, without any other portion of the record of the suit in that court, except enough to show its title and the entry of discontinuance, were sent into the Circuit Court. By that court they were remanded to the State court as not constituting a suit that could be removed under the twelfth section of the Judicial Act.

To this action of the Circuit Court, West and Torrance took exceptions, and the case was now here on error; the question being whether the action of the Circuit Court was right.

The CHIEF JUSTICE delivered the opinion of the court.

We think that the Circuit Court was clearly right in its action. The filing of the additional paragraphs did not make a new suit within the meaning of the Judicial Act. They were in the nature of defensive pleas, coupled with a prayer for injunction and general relief. This, if allowed by the code of Indiana, might give them, in some sense, the character of an original suit, but not such as could be removed from the jurisdiction of the State court. The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a State court, who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action.

And it is given only to a defendant who promptly avails himself of the right at the time of appearance, by declining to plead and filing his petition for removal.

In the case before us, West and Torrance, citizens of Ohio, voluntarily resorted, as plaintiffs, to the State Court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the Circuit Court of the United States.

It is equally fatal to the supposed right of removal that the record presents only a fragment of a cause, unintelligible except by reference to other matters not sent up from the State court, and through explanations of counsel.

A suit removable from a State court must be a suit regularly commenced by a citizen of the State in which the suit is brought, by process served upon a defendant who is a citizen of another State, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the State court.

This is not such a suit, and the order of the Circuit Court remanding the cause to the State court must therefore be

Affirmed.[1]

[1] The fact that an original defendant sets up a counterclaim does not make the original plaintiff a defendant for the purpose of removing that part of the case dealing with the counterclaim to a Federal Court. Illinois Cent. R. Co. v. A. Waller & Co., 164 Fed. 358 (1908). Price & Hart v. T. J. Ellis & Co., 129 Fed. 482 (1904) contra.

As to the effect of original defendant's setting up a cross-complaint, see Hansen v. Pacific Coast Asphalt Cement Co., 243 Fed. 283 (1917).

See also Hudson River Railroad & Terminal Co. v. Day, 54 Fed. 545, 546 (1893).—Ed.

HALLAM v. TILLINGHAST.

Circuit Court, D. Washington, W. D. 1896.

75 Fed. 849.

Hanford, District Judge.—This is a suit in equity, originally commenced in the superior court of the State of Washington, for Pierce County, against the defendant, as receiver of an insolvent national bank, appointed by the comptroller of the currency. The object of the suit is to reach assets of an insolvent national bank, and to establish a claim of priority against the funds of the bank in the official custody of the defendant as such receiver. The amount involved is $478.75. The case was removed into this court by the defendant on the ground that Federal questions were involved, and the defendant has the right to invoke the jurisdiction of the Federal Court in all matters of litigation affecting his trust. The complainant denies the jurisdiction of this court, and has moved to remand the cause to the court in which it was originally commenced. In the cases of Price v. Abbott, 17 Fed. 506; Armstrong v. Ettlesohn, 36 Fed. 209; and Armstrong v. Trautman, Id. 275,—and other cases cited as authority by the defendant, the jurisdiction of the Circuit Court appears to have been sustained on the ground that a receiver of a national bank is an officer of the United States by the third subdivision of section 629 of the Revised Statutes of the United States. That law, however, by its terms, is applicable only to cases at common law commenced originally in a Circuit Court, and in which an officer of the United States is plaintiff. It does not apply to a suit in equity, nor to a case in which an officer of the United States is defendant, and no authority is given to remove such a case from a State court into a Circuit Court. This case is one arising under the laws of the United States, and, if the amount involved were sufficient, it would be removable under the acts defining the jurisdiction of the Circuit courts, approved March 3, 1875, and March 3, 1887. But the Act of March 3, 1875, limits the right of removal to cases where the matter in dispute, exclusive of costs, amounts to the sum or value of $500; and by the Act of March 3, 1887, the amount necessary to give jurisdiction, and to entitle a defendant to remove a cause into a Circuit Court, is raised to $2,000.[1]

[1] Only a portion of the opinion is reprinted.—Ed.

WILSON v. SMITH.

Circuit Court, E. D. Pennsylvania. 1895.

66 Fed. 81.

Sur Motion to Remand to State Court.

DALLAS, Circuit Judge.—This case was originally brought in a court of Pennsylvania by a citizen of that State. The defendant, a citizen of Delaware, caused its removal to this court. The plaintiff insists that it should be remanded, and upon two grounds, with reference to which his motion to that end will be decided.

1. It is asserted that the defendant, who is sued as executor, "having come into this State, and having taken out ancillary letters, is, for the purpose of this suit, a citizen of Pennsylvania, and there is no diverse citizenship as required by the act." This proposition is in conflict with the law as settled by the highest authority. "Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing." Amory v. Amory, 95 U. S. 187.[1]

2. It is further contended that, notwithstanding the diverse citizenship of the parties, this suit is one of which a Circuit Court of the United States has not jurisdiction. It is an action, in common-law form, for the recovery of a legacy. It was brought in conformity with a statute of the State of Pennsylvania which authorizes such actions. Act Feb. 24, 1834 (P. L. p. 83, § 50); Purd. Dig. p. 449, pl. 215. Without this statute, a proceeding in accordance with chancery methods would have been the only available one in the State court. It, however, only provided a new form of remedy; the tribunal remained the same, and its jurisdiction was not extended or altered. In Pennsylvania the same courts administer both law and equity, and whether any particular case is of the one class or the other is not a question of jurisdiction, but of form merely. Adams v. Beach, 1 Phila. 101. Ac-

[1] For further cases on representative parties, see In re M'Clean, 26 Fed. 49 (1885) guardian of minor; Brisenden v. Chamberlain, 53 Fed. 307, 310 (1892) receiver of railroad company.

But see Bates v. New Orleans, B. R. & V. R. Co., 16 Fed. 294 (1883) trustee; Wilcoxen v. Chicago, B. & Q. R. Co., 16 Fed. 444, 448 (1902) guardian of insane person; Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728, 734 (1912) agent, whose agency is not coupled with an interest.—Ed.

cordingly, those courts have held that cases under this particular statute are, substantially, suits in equity. Seibert v. Butz, 9 Watts 494; Dunlop v. Bard, 2 Pen. & W. 309. The subject-matter of the present litigation is within this court's jurisdiction in equity, but not at law; and inasmuch as here the distinction between equity and law cannot (as in the Pennsylvania courts) be disregarded, nor the principles and remedies peculiar to either system be applied under the other, it is contended that this cause has been transferred to a court which, as a court of equity, cannot entertain it, because it is an action at law, and which, as a court of law, cannot take cognizance of it, for want of jurisdiction. This contention involves the acceptance of a consequence, which, as I ventured to suggest upon the argument, seems to be inadmissible. That a State, by simply prescribing a peculiar form of procedure for its own courts, may, in any case, divest the rightful jurisdiction of those of the United States, is a doctrine to which I am wholly unable to assent, and which does not appear to be supported by any precedent or authority. The Act of Congress of 1888 (25 Stat. 433) provides that any suit of a civil nature, at law or in equity, may be removed, wherever the sum in dispute amounts to $2,000, and the controversy is between citizens of different States; and the right thus accorded pertains to all proceedings of a civil nature, of whatever form, provided they are suits at law or in equity. Any case which in the State court was either the one or the other of those becomes, upon its proper removal to a Circuit Court of the United States, cognizable by it. Fuller v. Wright, 23 Fed. 833; In re Cilley, 58 Fed. 987; Clark v. Smith, 13 Pet. 203; Parker v. Overman, 18 How. 141; Thompson v. Railroad Co., 6 Wall. 138; Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460. Whether the jurisdiction of this court is upon its law side or its equity side will be determined "by the essential character of the case," but the right of removal is not affected by any such question. That right exists if, upon either side, the requisite jurisdiction exists. Where a cause brought here by removal cannot be entertained upon the one side, it must be assigned to the other, but it is not to be remitted to the State court if, upon either side, the Federal Court is competent to retain and decide it. Van Norden v. Morton, 99 U. S. 378. In the cases in which the right of removal has been denied or questioned, the proceedings in the State courts have been, in their nature, not civil suits, either at law or in equity, or else some independent condition of the statute (ex gr. as to the sum in dispute) has been

lacking. Gaines v. Fuentes, 92 U. S. 10; In re Cilley, 58 Fed. 977; Dey v. Railway Co., 45 Fed. 82; In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141. The motion to remand is denied.

DOW v. BRADSTREET CO.

Circuit Court, S. D. Iowa, W. D. 1891.

46 Fed. 824.

At Law. Motion to remand.

SHIRAS, J.—In the petition, filed in this case in the District Court of Crawford County, Iowa, it is averred that the Bradstreet Company is a corporation created under the laws of the State of Connecticut, engaged in carrying on the business of a mercantile agency throughout the United States; that the defendant H. S. Green is an agent and correspondent of said company, located at Dow City, Crawford County, Iowa; that on or about the 21st of December, 1890, said Green sent to the office of the Bradstreet Company at Des Moines, Iowa, a telegram stating that the plaintiff, who was engaged in business at Dow City, Iowa, had transferred a large quantity of real estate, and on the 24th of December, 1890, said Green sent or caused to be sent to the Bradstreet Company a further telegram to the effect that plaintiff had failed in business; that the Bradstreet Company caused to be published to all of its subscribers the information contained in the telegrams mentioned; that the statements thus forwarded by Green and published by the company were false, and worked great injury to plaintiff, causing him damages in the sum of $100,000, for which amount judgment is prayed against the defendants. The defendant company in due season filed a petition for the removal of the case into this court, averring therein that the company was, when the suit was brought, and continues to be, a corporation created under the laws of the State of Connecticut; that the plaintiff was and is a citizen of the State of Iowa; that the action involved two controversies,—one against the defendant Green for sending the alleged false information by telegram to the company, and the other against the company for communicating or publishing the same to its subscribers,—and that the controversies are separable, and for that reason the case is a removable one, and further, that the defendant Green is joined as a defend-

ant to prevent a removal of the case; that he is a sham defendant, has no interest in the controversy, never was the agent of the company, never sent any telegram to the company touching the plaintiff, and has no connection with the matter, and is simply joined as a defendant for the purpose of defeating the jurisdiction of this court. In support of the petition for removal the affidavits of the agent of the company at Des Moines and of the defendant Green are filed, in which it is averred that Green was not the agent or correspondent of the company at Dow City or elsewhere; that he did not furnish any information, by telegram or otherwise, to the company in regard to the plaintiff, and had no connection, direct or indirect, therewith. A transcript of the record having been filed in this court, the plaintiff now moves for an order remanding the case to the State court, and thus the question of the jurisdiction of this court is presented for determination. * * *

The next question for determination is that arising upon the averment of the petition for removal, that Green is but a sham party, having been joined as a defendant for the purpose of defeating the jurisdiction of this court. The first point for consideration is whether, if true, such fact can be shown in aid of a petition for removal filed by the real defendant. The principle has always been recognized that the joinder of purely nominal parties in an action cannot defeat the removal of the cause by the real party in interest if the jurisdictional facts exist as to him. Wood v. Davis, 18 How. 467; Sewing-Machine Cases, 18 Wall. 553; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. Rep. 3. If, then, in determining the question of jurisdiction, either original or by removal, it is permissible to ignore the presence of parties who, upon the record, appear to be purely nominal parties, having no real interest in or relation to the cause of action, should not the same rule apply in case it appears that a given party has been made such, solely for the purpose of defeating the right of removal to the Federal Court, without such party having any interest in the subject of litigation? In the case of Society v. Ford, 114 U. S. 635, 5 Sup. Ct. Rep. 1104, it was held that the colorable or fraudulent assignment of a cause of action from A. to B., the latter being a citizen of the same State as the defendant, and the suit being brought in the name of B., could not be availed of as ground for removal, which right would have existed had the suit been in the name of A. It was held that the colorable or fraudulent nature of the assignment would be a defense to the

action as brought, but that proof of the fraudulent purpose of the assignment would not have the effect of changing the action from one between citizens of the same State to one between citizens of different States. To the same effect was the ruling in Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. Rep. 944. In those cases there was but a single plaintiff, and therefore the question of the joinder of nominal, immaterial, or sham parties with the real parties in interest was not presented. In Arapahoe Co. v. Railway Co., 4 Dill. 277, Justice MILLER ruled that—

"It would be a very dangerous doctrine,—one utterly destructive of the rights which a man has to go into the Federal courts on account of his citizenship,—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in Federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

The ruling of Justice MILLER in this case was cited approvingly by the Supreme Court in Walden v. Skinner, 101 U. S. 577. The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the Circuit Court of the United States regard will be had only to the citizenship of real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in or actual connection with the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the Federal Court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the Constitution and laws of the United States, and it certainly must be true that it cannot be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same State as the plaintiff. In Plymouth Min. Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. Rep. 1034, it was said:

"Under these circumstances, the averments in the petition that the defendants were wrongfully made to avoid a removal can be of no avail to the Circuit Court upon a motion to remand, until they are proven; and that, so far as the present record discloses,

was not attempted. The affirmative of the issue was on petitioning defendant. That corporation was the moving party, and was bound to make out its case."

In Railroad Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. Rep. 203, is found the following:

"As to the suggestion, made in argument, that the Southeast and St. Louis Ry. Company was fraudulently joined as a defendant in the State court for the purpose of depriving the Louisville and Nashville R. R. Company of the right to remove the case into the Circuit Court of the United States, it is enough to say that no fraud was alleged in the petition for removal, or pleaded or offered to be proved in the Circuit Court."

Although not, perhaps, express adjudications upon the question, these intimations of the views of the Supreme Court support the doctrine that it is open to a party who desires to remove a case brought against him to show upon proper allegations and proof that a co-defendant has been wrongfully joined with him for the fraudulent purpose of defeating the actual right of removal to the Federal Court, and this is the conclusion reached in the present case. To properly present the question, the allegations of fact relied upon as showing the fraudulent joinder of the party should be made in the petition for removal, unless they otherwise appear upon the face of the record. If the facts alleged, if true, make out the charge of fraudulent misjoinder of parties for the purpose named, and the other party desires to make issue upon the truth thereof, then the trial thereof must be had in the Federal Court, for, as is said by the Supreme Court in Railroad Co. v. Daugherty, 138 U. S. 298, 11 Sup. Ct. Rep. 306, "it is thoroughly settled that issues of fact raised upon petitions for removal must be tried in the Circuit Court of the United States." See, also, Carson v. Hyatt, 118 U. S. 279, 6 Sup. Ct. Rep. 1050; Railroad Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. Rep. 1262; Crehore v. Railroad Co., 131 U. S. 240, 9 Sup. Ct. Rep. 692. As already stated, in the petition for removal filed in this cause, the same being under oath, the allegation is expressly made that the defendant Green never was the agent of the Bradstreet Company, did not send the telegrams referred to in plaintiff's petition, had no connection therewith, and that he is joined as a co-defendant without reason therefor, and for the express purpose of defeating the jurisdiction of this court, and in support of the petition the affidavits of the defendant company and of H. L. Green are filed. The motion to remand does not raise an issue upon the facts thus alleged and sustained, but presents the legal

questions already discussed, and upon these the ruling must be adverse to the motion to remand. We are as yet without precedents to guide us in determining the proper practice to be followed in cases of this character. No objection is now seen to the course pursued in the present case. By setting forth fully in the petition for removal filed in the State court the facts relied on as the basis for the charge that the joinder of a sham defendant has been made for the fraudulent purpose of defeating thereby the right of removal to the Federal Court, the State court is enabled to determine whether, upon the face of the record, the case is a removable one, assuming the facts alleged to be true; and by filing affidavits in support of the facts averred in the petition for removal formal evidence is submitted for the consideration of the Federal Court, and, if the facts set forth in the affidavits are deemed sufficient, no further evidence need be submitted unless issue is taken in some form upon the allegations of fact, when such issue will stand for trial in the Federal Court upon the evidence to be introduced by both parties thereon. Treating the present motion to remand as being intended to present only the legal questions arising upon the face of the record, and as not presenting an issue of fact upon the allegations of the petition for removal, the same is overruled.[1]

FLOYT v. SHENANGO FURNACE CO.

Circuit Court, D. Minnesota, Fifth Division. 1911.

186 Fed. 539.

AMIDON, District Judge.—This cause came on to be heard upon the motion of the plaintiff to remand the case to the State court, and was heard upon the complaint and the petition filed by the defendant Shenango Furnace Company for the removal of the cause to the Federal Court.

(1) It appears from the complaint that the defendant Shenango Furnace Company, a foreign corporation, is engaged in

[1] Only a portion of the case is reprinted.

See also Collins v. Wellington, 31 Fed. 211 (1887); Nelson v. Hennessey, 33 Fed. 113 (1887); Arrowsmith v. Nashville & D. R. Co., 57 Fed. 165, 170 (1893).

As to effect of plaintiff's motive in joining parties, see Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. 85, 87 (1904).

As to what must be done to show a fraudulent joinder of defendants, see West Kentucky Coal Co. v. Key, 178 Ky. 220, 223, 198 S. W. 724, 725 (1917); Warax v. Cincinnati, N. O. & T. P. Ry. Co., 72 Fed. 637, 640 (1896); Martin v. Matson Nav. Co., 239 Fed. 188, 190 (1917).—Ed.

operating an underground mine, and in connection therewith employed what is known as a "ladderway" leading from one level of the mine to another. The workmen are required to pass over this ladderway in the performance of their duty, and the complaint charges that the defendant failed to perform its duty to maintain this appliance in a reasonably safe condition. The complaint further charges that the defendant James Hogdon is a citizen of the same State as the plaintiff. He is known as a "mining captain," and was charged with the supervision of the mine and the workmen engaged therein, and that it was also his duty to see that the appliances used in the mine were in a reasonably safe condition. The only negligence charged against him is simply nonfeasance, in that he failed to perform the positive duty of the master to properly inspect and repair the ladderway. Upon well-established principles of the common law, Hogdon was not liable to third parties or co-employes for nonfeasance. For that he is liable only to his employer. Bryce v. Southern Ry. Co. (C. C.), 124 Fed. 959; Mechem on Agency, §§ 569, 573; Greenberg v. Whitcomb Lumber Co., 90 Wis. 231, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470.

(2) When the complaint thus discloses upon its face that the plaintiff has no cause of action against the employe who is made defendant, the cause is removable by the other defendant, if the proper diversity of citizenship exists between that defendant and the plaintiff. Marach v. Columbia Box Co. (C. C.), 179 Fed. 412; Lockard v. St. Louis & San Francisco R. R. Co. (C. C.), 167 Fed. 675; Chicago, R. I. & P. Ry. Co. v. Stepp (C. C.), 151 Fed. 908.

The case of Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, settles the question, that has for some time been in doubt, that when an employe is joined by the plaintiff as co-defendant with the employer, and it is made to appear that the plaintiff in fact has no cause of action against such employe, and the circumstances are such that the plaintiff must have known that he had no cause of action when he made him a defendant, and that such employe is joined as a defendant solely for the purpose of defeating the right of the other defendant to remove the cause into the Federal Court, the joinder of the employe is then fraudulent, and the same may be properly removed by the other defendant, if the requisite diversity of citizenship exists. In the case just referred to, the fact that the plaintiff had no cause of action against the employe did not appear on the face of the complaint, but was disclosed by the petition and by affi-

davits, and upon the showing thus made it was held that the fact that the plaintiff had no cause of action against the employe justified the inference that his joinder as a defendant was fraudulent. To the objection that this inference ought not to be drawn, the court said at page 185 of 204 U. S., at page 188 of 27 Sup. Ct. (51 L. Ed. 430):

"It is objected that there was no proof that Weeker knew of Wettingel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him; but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach."

If a showing by affidavit that the plaintiff has no cause of action as against the employe will sustain a removal by the other defendant, surely that result ought to follow when the complaint upon its face makes the same disclosure. There can be no higher evidence that the joinder is fraudulent than the fact that on the face of the complaint, under well-established principles of law, no cause of action is stated against the employe. It has been invariably held that, if the plaintiff dismisses his action as to the employe, the cause may then be removed into the Federal Court by the other defendant; but if the complaint states no cause of action against the employe, the case stands the same as it would upon a dismissal as to him. Under such circumstances, it appears upon the face of the pleading that there is only a single controversy, and that that controversy is wholly between the plaintiff and the other defendant. Upon such a record it would seem altogether plain that the cause is removable into the Federal Court, when the proper diversity of citizenship exists between the plaintiff and the only defendant as to whom a cause of action is stated.

The motion to remand is therefore denied.

MARTIN v. SNYDER.

Supreme Court of the United States. 1893.

148 U. S. 663, 13 S. Ct. 706, 37 L. Ed. 602.

The CHIEF JUSTICE:—This was a bill of complaint filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the City, County and State of New York, against Morris T. Martin and Carrie E. Martin, in the Circuit Court of Lake County in the State of Illinois, on the 27th of October, 1887.

November 7, 1887, the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Illinois on the ground of diverse citizenship, and the case was transferred accordingly.

The petition stated "that the controversy in said suit is between citizens of different States, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Illinois, and that all the plaintiffs were then and still are citizens of the State of New York."

Under the Act of Congress of March 3, 1887, 24 Stat. 552, c. 373, it is the defendant or defendants who are non-residents of the State in which the action is pending, who may remove the same into the Circuit Court of the United States for the proper district. The defendants here were not entitled to such removal, and the decree, which was in favor of complainants and from which the defendants prosecuted this appeal, must be reversed for want of jurisdiction, with costs against the appellants, and the case remanded to the Circuit Court with directions to render a judgment against them for costs in that court, and to remand the case to the State Court. Torrence v. Shedd, 144 U. S. 527, 533.

Judgment reversed and cause remanded accordingly.[1]

In Gilson v. Mutual Reserve Fund Life Ass'n, 129 Fed. 1003 (1904) EVANS, District Judge, sitting as a judge of the Circuit Court, said:

"The defendant, alleging itself to be a citizen of New York, and the plaintiff to be a citizen of Kentucky, removed the case into this court, and the plaintiff has moved to remand the same to the State Court. By the judiciary act now in force, it was competent for the defendant, upon the ground alleged, to remove the case to this court, provided the amount in controversy, exclusive of interest and costs, exceeded the sum or value of $2,000."

FOSTER v. PARAGOULD S. E. R. CO.

Circuit Court, E. D. Missouri, E. D. 1896.

74 Fed. 273.

ADAMS, District Judge.—The question raised by the present motion is whether it is necessary for the record and papers in the

[1] As to the right of resident alien defendants to remove, see Walker v. O'Neill, 38 Fed. 374 (1889). But see Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Inc. Co., 202 Fed. 293 (1913). Compare Rones v. Katalla Co., 182 Fed. 946 (1910).

case to show that there was a diversity of citizenship of the parties within the meaning of the act relating to the removal of causes, both at the time the petition for removal was filed in the State Court and at the time the suit was commenced in the State Court, or whether it is sufficient if such diversity existed at the time the petition for removal was filed. The papers in the case show that the plaintiff, at the time the motion to remove was filed in the State Court, was a citizen of the State of Missouri, and that the defendant, at the time the motion to remove was filed, and also at the time the suit was instituted, was a citizen of the State of Arkansas. It does not appear, and cannot be ascertained from the record and papers in the case, whether the plaintiff was, at the time of the institution of his suit, a citizen of a different State than Arkansas.

This being a court of prescribed jurisdiction, the facts disclosing the same must affirmatively appear. The question therefore is: Is the fact that the record and papers fail to disclose the requisite citizenship at the time the suit was instituted in the State Court fatal to the jurisdiction of this court? The Judiciary Act of March 3, 1875, employs the same phraseology with respect to diverse citizenship of the parties in connection with the right of removal as is found in the Act of March 3, 1887, now in force. The first-mentioned act received construction, in the particulars now under consideration, by the Supreme Court of the United States in the cases of Gibson v. Bruce, 108 U. S. 561, 2 Sup. Ct. 873, Railway Co. v. Shirley, 111 U. S. 358, 4 Sup. Ct. 472, and Akers v. Akers, 117 U. S. 197, 6 Sup. Ct. 669; and in them it was held that a suit cannot be removed unless the requisite citizenship of the parties exists, both when the suit was begun and when the petition for removal was filed. The doctrine of these decisions controls the court in its action on the present motion. The motion is sustained.[1]

In re MOORE.

Supreme Court of the United States. 1908.

209 U. S. 490, 28 S. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164.

This is an application by petitioner for a writ of mandamus to compel the Circuit Court of the United States for the Eastern

1 Compare Curtin v. Decker, 5 Fed. 385 (1881), which is based upon the act of Mar. 3, 1875.—Ed.

Division of the Eastern Judicial District of Missouri to remand the case of this petitioner v. The Louisville & Nashville Railroad Company to the State Court, from whence it came.

The facts are these: On November 16, 1906, Albert Newton Moore, an infant, over the age of fourteen years, presented his petition to the Circuit Court of the City of St. Louis, Missouri, stating that he desired to institute a suit in that court against the Louisville and Nashville Railroad Company, and praying for the appointment of a next friend, whereupon George Safford, of St. Louis, was duly appointed such next friend. Thereupon a petition was filed in said State Court in the name of Moore, by his next friend, against the Louisville and Nashville Railroad Company, to recover damages for personal injuries. After service of summons, but before answer was due, the railroad company filed its application for removal to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. This application for removal was based on the ground of diverse citizenship, and alleged that the plaintiff Moore was a citizen and resident of the State of Illinois; that Safford, the next friend, was a resident and citizen of the State of Missouri, and the defendant, a corporation created and existing under the laws of the State of Kentucky and a citizen and resident of that State. The petition and bond were in due form, and the case was transferred to the United States Circuit Court. Thereafter, and on March 22, 1907, the plaintiff filed in that court an amended petition. On March 25, by stipulation of the parties, the defendant was given time to plead to the plaintiff's amended petition. Three or four times thereafter stipulations for continuances were entered into by the counsel for both sides. At the September term, 1907, a motion to remand, made by plaintiff, was overruled. Thereupon this application for mandamus was presented. * * *

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

It was held in ex parte Wisner, 203 U. S. 449, that;

"Under sections 1, 2, 3 of the Act of March 3, 1875, 18 Stat. 470, as amended by the Act of March 1, 1887, 24 Stat. 552, corrected by the Act of August 13, 1888, 25 Stat. 433, an action commenced in a State Court, by a citizen of another State, against a non-resident defendant, who is a citizen of a State other than that

of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States."

On the authority of this case it is contended by petitioner that as in this action none of the parties were citizens of the State of Missouri, it could not be removed by the defendant into the Circuit Court of the United States, and that upon the failure of the United States Circuit Court to remand the case to the State Court in which it was originally brought mandamus from this court is an appropriate remedy. But in that case the plaintiff never consented to accept the jurisdiction of the United States Court, while in this case it is contended that both parties did so consent, and that therefore the decision in that case is not controlling.

This brings up two questions, first, whether both parties did consent to accept the jurisdiction of the United States Court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States Court.

That the defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State of the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer; and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States Court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that court. * * *

Turning now to the other question, the Constitution, Art. III, § 2, provides that the judicial power of the United States shall extend to controversies "between citizens of different States." Section 11 of the Judiciary Act of 1789 (1 Stat. 78) granted to the Circuit courts original cognizance "of all suits of a civil nature at common law or in equity * * * where the suit is between a citizen of the State where the suit is brought, and a citizen of another State," and added: "And no civil suit shall be brought

before either of said courts (Circuit or District) against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Section 12 (p. 79) provided "that if a suit be commenced in any State Court * * * by a citizen of the State in which the suit is brought against a citizen of another State," a removal might be had of the case to the next Circuit Court to be held in the district where the suit is pending. The first section of the Act of August 13, 1888, c. 866, 25 Stat. 433, like the Judiciary Act, invested the Circuit courts of the United States with original cognizance of suits in which there is a controversy between citizens of different States, provided that no civil suit should be brought before either of said courts (Circuit or District) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, and closed with these words, "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the resident of either the plaintiff or the defendant." The second sentence of § 2 prescribed, in respect to removals, that "any other suit of a civil nature, at law or in equity, of which the Circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit courts of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." It will thus be seen that by both the Act of 1789 and that of 1888 there is a general grant to Circuit courts of jurisdiction over controversies between citizens of different States, and in each of them there is a limitation as to the district in which the action must be brought. In the light of this similarity between these two acts must the second question be considered.

The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from § 1, it cannot under § 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought.

It may be well to examine the authorities touching this matter. In Gracie v. Palmer, 8 Wheat. 699, the court, by Mr. Chief Justice MARSHALL, held that:

"The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance."

In Toland v. Sprague, 12 Pet. 300, 330, Mr. Justice BARBOUR thus stated the rule:

"Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But this is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process in *personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive. Pollard v. Dwight, 4 Cranch 421; Barry v. Foyles, 1 Pet. 311." * * *

Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit had been brought in the wrong district. Charlotte Nat. Bank v. Morgan, 132 U. S. 141; Fitzgerald Construction Company v. Fitzgerald, 137 U. S. 98." * * *

Several other cases in this court, as well as many in the Circuit courts and Circuit Courts of Appeal, might be noticed, in which a similar ruling as to the effect of a waiver was announced. It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States Court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in Kinney v. Columbia Saving & Loan Association, 191 U. S. 78, a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal Court, and if when the defendant is brought

into a Federal Court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal Court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the Circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a State Court, and if any objection arises to the particular court which does not run to the Circuit Court as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction. * * *

The jurisdiction of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri was settled by the proceedings had by the two parties, and the application for a writ of mandamus is

Denied.[1]

HYDE v. RUBLE.

Supreme Court of the United States. 1881.

104 U. S. 407, 26 L. Ed. 823.

Mr. Chief Justice Waite delivered the opinion of the court.

This was a suit begun by Ruble and Green, on the 6th of March, 1880, in a State Court of Minnesota, upon an alleged contract of bailment made by the defendants as partners. The amount involved was a little more than $500. The plaintiffs were citizens of Minnesota. Only one defendant, Rowell, was a citizen of that State. The business of the alleged partnership was carried on there. He filed a separate answer to the complaint, in which he denied the existence of any partnership between himself and the other defendants, and set up a full performance of the contract

[1] The dissenting opinion of the chief justice, and portions of the opinion of Mr. Justice Brewer are omitted.—Ed.

on his part. The other defendants joined in a separate answer for themselves, in which they denied any partnership with him, and any contract between themselves and the plaintiffs. They also denied generally all the allegations of the complaint.

On the 12th of April, 1880, after these answers were in, all the defendants, including Rowell, filed in the State Court a petition for the removal of the suit to the Circuit Court of the United States for the District of Minnesota, on the ground of the citizenship of the parties. At the next term of the Circuit Court the cause was remanded to the State Court. This order was entered in the Circuit Court July 31, 1880, and a copy thereof filed in the State Court on the 11th of August. On the 12th of January, 1881, at a term of the State Court which began on the 10th of that month, another petition was filed, by all the defendants who were not citizens of Minnesota, for a removal of the suit, as to themselves, on the ground that there could be a final determination of the controversy, so far as it concerned them, without the presence of Rowell as a party. It is not contended that this petition was filed in time to effect a removal under the second clause of the second section of the Act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470); but the State Court ordered a removal, so far as concerned the petitioning defendants, leaving the suit to proceed in that court as to Rowell. When the case was docketed in the Circuit Court under this second removal it was again remanded. To reverse these several orders of the Circuit Court this writ of error has been brought by the defendants.

This action is clearly one sounding in contract and not in tort. According to the allegations of the complaint the plaintiffs stored, at an agreed rate, their wheat with the defendants, who undertook to buy it and pay for it at the market price whenever the plaintiffs wanted to sell. The action is brought to recover what is alleged to be due on the price according to the terms of this contract. All the allegations of wrongful conversion are immaterial, and in no way change the character of the suit.

The suit, then, as it stands on the complaint, is in respect to a controversy between the parties as to the liability of the defendants on a single contract. Our ground of defense is, that there was no partnership between the defendants, and that Rowell alone was bound by the contract that was made; and another, that the contract, by whomsoever made, had been fully performed. Clearly, then, under our rulings in Removal Cases (100 U. S. 457) and Blake v. McKim (103 id. 336) the case was not removable under

the first clause of the second section of the Act of 1875, because all the parties on one side of the controversy were not citizens of different States from those on the other.

Neither do we think it was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other. Thus, in Barney v. Latham (103 id. 205), two separate and distinct controversies were directly involved: one as to the lands held by the Winona & St. Peter Land Company, in respect to which the land company was the only necessary party on one side, and the plaintiff on the other; and the second as to the moneys collected from the sales of lands before the land company was formed, and as to which only the natural persons named as defendants were the necessary party on one side and the plaintiffs on the other. One was a controversy about land, and the other about the money. Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in each suit as to the particular controversy involved. In that about the land, the land company would have been the only necessary defendant; and in that about the money, the natural persons need only have been brought in. In that about the land there could not have been a removal, because the parties on both sides would have been citizens of the same State; while in that about the money there could have been, as the plaintiffs would all be citizens of one State, while the defendants would all be citizens of another. When two such causes of action are found united in one suit, we held in the case last cited there could be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy, which, if it had been sued on alone, would be removable. But that, we think, does not meet the requirements of this case. This suit presents but a single cause of action, that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy.[1]

[1] An extended list of cases dealing with separable controversies to be found in 2 Foster Federal Practice (5th Ed.) pp. 1792-1806.

See also Plunkett v. Gulf Refining Co., 259 Fed. 968, 971-974 (1919); Morgan v. Hines, 260 Fed. 585 (1919).—Ed.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. MARTIN.

Supreme Court of the United States. 1900.

178 U. S. 245, 20 S. Ct. 854, 44 L. Ed. 1055.

This was an action brought by Lissa Martin as administratrix of William Martin, deceased, against the Chicago, Rock Island and Pacific Railroad Company, and Clark and others, receivers of the Union Pacific Railway Company, in the District Court of Clay County, Kansas, to recover damages for the death of the decedent. Plaintiff's petition was filed January 26, 1894, and on February 14, 1894, the Chicago, Rock Island and Pacific Railroad Company filed its separate answer thereto. February 20, 1894, defendants Clark and others, as receivers, presented their petition and bond, praying for the removal of the cause to the United States Circuit Court for the District of Kansas, on the ground that the case arose under the Constitution and laws of the United States, which application was overruled by the District Court, and the receivers duly excepted. The cause was tried, the jury returned a verdict in favor of plaintiff and against all the defendants, and judgment was entered thereon. The cause was taken on error to the Supreme Court of Kansas by the defendants, and the judgment was by that court affirmed. 59 Kansas 437.

The refusal of the State Court to remove the cause to the Circuit Court of the United States on the application of the receivers was relied on as error throughout the proceedings, and the Supreme Court of Kansas held, among other things, that the application for removal was properly denied because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the Chicago, Rock Island and Pacific Railroad Company, defendant, to join in the application of its co-defendants, the receivers of the Union Pacific Railway Company, to effect a removal to the Circuit Court.

The Rock Island Company was not a corporation of Kansas, and all the receivers of the Union Pacific Railroad Company were citizens of some other State than the State of Kansas. But the receivers applied for removal, after the Rock Island Company had answered, on the ground that the suit was, as to them, "one aris-

ing under the laws of the United States," in that they were appointed receivers by the Circuit Court of the United States for the Districts of Nebraska and Kansas, to take charge of and to operate, a corporation created by the consolidation, under acts of Congress, of a corporation of the United States, a corporation of Kansas and a corporation of Colorado.

The Act of March 3, 1887, as corrected by the Act of August 13, 1888, 25 Stat. 433, c. 866, 2, provides:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit courts of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court * * *."

It thus appears on the face of the statute that if a suit arises under the Constitution or laws of the United States, or if it is a suit between citizens of different States, the defendant, if there be but one, may remove, or the defendants, if there be more than one; but where the suit is between citizens of different States and there is a separable controversy, then either one or more of the defendants may remove.

Under the first clause of section 2 of the Act of 1875, 18 Stat. 470, c. 137, which applied to "either party," but in its re-enactment in the second clause of section 2 of the Act of 1887, above quoted, is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition; and so as to the second clause of the second section of the Act of 1875, which corresponds with the third clause of the second section of the Act of 1887, it was held that that clause only applied where there were two or more controversies in the same suit, one of which was wholly between citizens of different States. Hanrick v. Hanrick, 153 U. S. 192, and cases cited; Torrence v. Shedd, 144 U. S. 527, and cases cited. In the latter case, Mr. Justice GRAY said: "As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, 'separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'" And see Whitcomb v. Smithson, 175 U. S. 635.[1]

THURBER v. MILLER.

Circuit Court of Appeals, Eighth Circuit. 1895.

67 Fed. 371, 14 C. C. A. 432.

CALDWELL, Circuit Judge, delivered the opinion of the court.

There is another fact disclosed by the record equally fatal to the jurisdiction of the Circuit Court. The plaintiff in the action is a

[1] An analysis of certain cases is omitted.

As to the necessity of nominal defendants joining in a removal petition, see Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 609-610, 7 C. C. A. 386, 387-388 (1893).

As to the effect of the joinder of unnecessary parties in a removal petition, see Snow v. Smith, 88 Fed. 657, 659 (1882).—Ed.

citizen of New York, and the defendant Evans, on whose petition the suit was removed from the State to the Circuit Court, is a citizen of South Dakota,—the State in which the suit was brought. The removal of suits upon the ground that they involve separate controversies was first provided for by the Act of July 27, 1866 (14 Stat. 306, c. 288). That act gave the right of removal to "the defendant who is a citizen of a State other than that in which the suit is brought." The provision of the Act of 1866, that the defendant authorized to remove a suit upon the ground of a separable controversy must be a citizen of a State other than that in which the suit was pending, was in harmony with the rule that had always obtained with reference to the citizenship of a defendant in removing a cause from a State to a Federal Court. Under the Judiciary Act of 1789 (1 Stat. 73, c. 20, § 12), a defendant sued in a court of his own State by a citizen of another State could not remove the suit. It was only when the defendant was sued in the courts of a State of which he was not a citizen that he could remove the suit to the Circuit Court. Under the Act of March 2, 1867 (14 Stat. 558, c. 196), which first gave the right of removal on the ground of prejudice or local influence, the right was confined to "such citizen of another State, whether he be plaintiff or defendant." The provisions of these acts restricting the right of removal to the party who is a citizen of a State other than that in which the suit is brought were re-enacted and carried into the Revised Statutes of 1873-74 (section 639, Rev. St. subsecs. 1-3). The first innovation upon this seemingly just and reasonable rule which had obtained from the organization of the Federal courts occurred in the Act of 1875. 18 Stat. c. 137. That act was designed to enlarge the jurisdiction of the Circuit courts of the United States, whether original over suits brought therein, or by removal from the State courts. It extended the jurisdiction of the Federal courts to the very verge of the constitutional limit of the grant of judicial power. Among other provisions to carry out this object, it extended the right of removal to "either party or one or more of the plaintiffs or defendants," and did not restrict the right to the party or parties who were non-residents of the State in which the suit was brought. But this act was, in turn, superseded and repealed by the Act of March 3, 1887, as corrected by the Act of August 13, 1888 (25 Stat. 434, c. 866). Section 2 of that act provides:

"Sec. 2. (1) That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States,

or treaties made, or which shall be made, under their authority, of which the Circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein, to the Circuit Court of the United States for the proper district. (2) Any other suit of a civil nature, at law or in equity, of which the Circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. (3) And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. (4) And where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court, or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

This act restores the rule of the Judiciary Act of 1789 as relates to the party who may remove the suit, by restricting the right of removal to "the defendant or defendants." Under this act, a plaintiff who commences a suit in a State Court cannot afterwards remove it. He is bound to remain in the forum of his own selection. It will be observed that the second clause of the section relating to the removal of suits between citizens of different States restricts the right of removal to "non-residents of that State," i. e. the state in which the suit is brought; and a like restriction is contained in the fourth clause, relating to removals on the ground of prejudice or local influence. While this restriction is not found, in express terms, in the third clause, relating to the removal of suits in which there shall be a controversy which is wholly between

citizens of different States, it is plainly implied, and what is implied in a statute is as much a part of it as what is expressed. U. S. v. Babbit, 1 Black 61; Gelpcke v. Dubuque, 1 Wall. 221; Wilson Co. v. Third Nat. Bank, 103 U. S. 770. * * *

When a defendant is sued alone in a court of the State of which he is a citizen, by a citizen of another State, and the causes of action are such that the suit might properly have been brought against him and another if the plaintiff so elected, he confessedly cannot remove the suit. Now, when the suit is brought on these same causes of action against him and another by the same plaintiff, in which there is—as there must be to give the right of removal at all—a controversy wholly between him and the plaintiff, what possible reason can be suggested why he should have the right to remove that controversy for trial into the Circuit Court in the one case, and the right be denied to him in the other? It is the same suit and the same controversy, and between the same parties, whether he is sued alone or with another. If he must be content with the justice of the courts of his own State in the one case, why not in the other? It would be difficult to conceive an intention in Congress to make such a senseless and absurd distinction. It is a canon of construction that every interpretation of a statute that leads to such results ought to be rejected. The mischief to be remedied by the Act of 1887 was the excessive jurisdiction conferred on the Circuit courts by the Act of 1875. The Supreme Court has said repeatedly that the Act of March 3, 1887 (24 Stat. 552, c. 373), as corrected by the Act of August 13, 1888 (25 Stat. 433, c. 866), "was intended to contract the jurisdiction of the Circuit courts of the United States, whether original over suits brought therein, or by removal from the State courts." Hanrick v. Hanrick, 153 U. S. 192, 197, 14 Sup. Ct. 835. In the case of In re Pennsylvania Co., 137 U. S. 451, 454, 11 Sup. Ct. 141, Mr. Justice BRADLEY, speaking for the Supreme Court, said: "The general object of the act is to contract the jurisdiction of the Federal courts." In the case of Smith v. Lyon, 133 U. S. 315, 321, 10 Sup. Ct. 303, Mr. Justice MILLER characterized it as "a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit courts of the United States." In Fisk v. Henarie, 142 U. S. 459, 467, 12 Sup. Ct. 207, Chief Justice FULLER, in delivering the opinion of the court, said: "The attempt was manifestly to restrain the volume of litigation pouring into the Federal courts, and to return to the standard of the judiciary act. * * *" By reference to the fourth clause of the second section, which we have

quoted, it will be observed that it does not name any amount as requisite to give jurisdiction where the suit is removed on the ground of prejudice or local influence, and it was contended that removals upon this ground could be made without regard to the amount in controversy, and this contention was upheld by some of the Circuit courts; but the Supreme Court of the United States, giving effect to the obvious purpose and intention of the act, held, in effect, that the requirement as to the amount necessary to give jurisdiction in other removal cases must be imported into this clause of the act, and that the suit could not be removed on the ground of prejudice or local influence unless the amount in controversy exceeded $2,000. In re Pennsylvania Co., *supra.* Again, as to the time when the application for removal must be filed, the same clause of the act, in express terms, declares it may be done "at any time before the trial thereof"; but the Supreme Court, taking into consideration all the provisions of the act, and the previous legislation on the subject, and the judicial expositions thereof, held that this language of the act ought not to receive a literal interpretation, but that it should be construed as requiring the petition "to be filed before or at the term at which the cause could first be tried, and before the trial thereof." Fisk v. Henarie, *supra.* The intention of the Act of 1887 is to confine the right of removal in all cases to defendants who are non-residents of the State in which they are sued. The plaintiff, when he sues in the State Court, having selected that forum, must remain there, whether he be a citizen of that or some other State. The defendant who is sued can only remove the suit when it is brought in a State other than that in which he resides. This, in the language of Chief Justice FULLER in Fisk v. Henarie, *supra,* is a "return to the standard of the Judiciary Act" of 1789, concerning which Mr. Rawle says: "But, if a * * * citizen of another State has commenced the suit, he cannot afterwards remove it, for he is bound by his own selection; nor can the defendant remove, for he is not to be apprehensive of the injustice of the courts of his own State." Rawle, Const. c. 25 p. 223. It is obvious, therefore, that the Act of 1887, so far at least as relates to the removal of suits on the ground of a separable controversy, intended to return to the rule of the Act of 1866, which first gave the right, and limited it to "the defendant who is a citizen of a State other than that in which the suit is brought." Evans, having wrongfully removed the case into the Circuit Court, must pay the costs in that court, as well as the costs of the appeal to this court. Hanrick v. Han-

rick, *supra*. The decree of the Circuit Court is reversed, and the cause remanded, with directions to that court to vacate all orders and decrees made therein, and remand the same to the State Court from whence it was removed.[1]

Sanborn, Circuit Judge.—I concur in the result in this case on the ground first stated in the opinion.

STANBROUGH v. COOK.

Circuit Court, N. D. Iowa, E. D. 1889.

38 Fed. 369.

The plaintiff, a citizen of New York, sued Edward Cook, a citizen of Iowa, together with other defendants, some of whom were citizens of Iowa, and others were citizens of Vermont.

At the March term of the State Court the defendant Edward Cook filed a petition and bond asking a removal of the cause into this court. A transcript of the record having been filed, the plaintiff now moves for an order remanding the case on the ground that the right of removal did not exist in favor of the defendant Cook, and that this court is without jurisdiction. The right of removal is claimed under the clause of section 2 of the Act of Congress approved August 13, 1888, which provides that, "and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."[2]

Shiras, J.—The most important question presented for decision is whether under this clause, under any circumstances, a removal can be had at the instance of a defendant residing in the State wherein the suit is brought. The contention on part of plaintiff is that the right of removal is restricted to non-resident defendants,

1 Only a portion of the opinion is reprinted.—Ed.

2 The facts are restated, and only a portion of the opinion is reprinted.—Ed.

even if it be true that the suit is one within the original jurisdiction of the United States Circuit Court, and embracing a controversy wholly between citizens of different States separable from the other issues therein. Section 2 of the act defines four general classes of removable cases: (1) Suits of a civil nature, at law or in equity, wherein original jurisdiction would exist in the United States Circuit Court under the provisions of section 1 of the act, by reason of their arising under the Constitution, laws, or treaties of the United States, and involving $2,000, are removable by the defendant or defendants. (2) Suits of a civil nature, at law or in equity, wherein original jurisdiction would exist in the United States Circuit Court under the provisions of section 1 of the act, by reason of the controversy being between citizens of different States, and involving over $2,000, or by reason of its being a controversy between citizens of the same State claiming lands under grants from different States, or by reason of its being a controversy between citizens of a State and foreign States, citizens, or subjects, and involving over $2,000, are removable by the defendant or defendants therein, if they are non-residents of the State wherein suit is brought in the State Court. (3) Suits of a civil nature, at law or in equity, coming within the original jurisdiction of the United States Circuit Court for any of the reasons enumerated in the two preceding paragraphs, and which include a controversy which is wholly between citizens of different States, and which can be fully determined as between them, are removable by either one or more of the defendants actually interested in such controversy. (4) Suits in which there is a controversy between a citizen of the State wherein the suit is brought and a citizen of another State may be removed on the ground of prejudice or local influence by a defendant, provided he is a citizen of a State other than that in which the suit is pending. In the first clause of section 2 covering the first classification given above the declaration is that the suit may be removed by the defendant or defendants. In the second clause of the section covering the second classification above given the declaration is that the suit may be removed by the defendant or defendants, being non-residents of the State wherein suit is pending. In the third clause of the section covering the third classification above given the declaration is that any one or more of the defendants actually interested in such controversy may remove the suit. In the fourth clause of the section covering the fourth classification above given the declaration is that any defendant, being a citizen of another State than that wherein suit

is pending, may remove the same. So far as the express language of clauses are concerned, in the first and third the right of removal is conferred on the defendant. In the second it is conferred on the defendant provided he is a non-resident of the State wherein suit is pending, which would include defendants who are citizens of other States, aliens, foreign subjects, and foreign States; and in the fourth the right of removal is conferred on the defendant provided he is a citizen of another State.

According to the argument of plaintiff the court should hold that in cases coming under the third classification above given, and the third clause of the section, the removal cannot be invoked by a defendant, unless he is a non-resident of the State wherein the suit is pending. It cannot be held that such is the meaning of the clause unless the court interpolates the words, "being a non-resident," into the clause of the section in question. In the next case perhaps the contention would be that the court should interpolate the words "being a citizen of another State" in order to conform to the wording of the fourth clause. So, also, if the court should interpolate these words in the third clause, would not the like reasoning require the interpolation of the same words in the first clause? Certainly this would be disregarding the plain words of the statute, and adding thereto qualifications and restrictions not found in it, as it was passed by Congress. Each of the four clauses in section 2 of the act deals with different classes of cases, and each clause defines by its terms by whom the right of removal may be exercised in the cases coming within the purview of each clause, and the court is not justified in adding to any of the several clauses restrictions upon the right of removal not found in the clause itself, on the ground that thereby the construction of the clause will be conformed to the true intent of Congress. Such a line of argument proceeds upon the theory that the court, aside from the language of the act, knows what the true intent of Congress was in adopting the act and the several clauses thereof, and must therefore add to the clauses any words necessary to conform the meaning thereof to the assumed intent of Congress, upon the assumption that they were accidentally omitted. In construing an act of the character and purpose of the one under consideration, the court must hold the meaning thereof to be that which the act itself discloses. We construe the act and the several clauses thereof to ascertain the meaning of Congress, and are not justified in assuming that Congress intended something not fairly deducible from the language of the act itself, as applied to the

subject-matter it is dealing with. It is clear beyond question that in section 2 of the act four general classes of removable cases are provided for, and each clause defines by whom such removal may be had of cases coming within the language of the clause. According to the plain intent and meaning of the language used, cases coming within the third clause—that is, suits involving a separable controversy wholly between citizens of different States—are removable by any one or more of the defendants actually interested in such separable controversy.

It is urged in argument that no good reason can be adduced why the right of removal is granted in this clause to a defendant, whether a resident or not of the State wherein suit is brought, but in the preceding clause is conferred only on non-resident defendants. It is a sufficient reason for the court to say, *ita scripta est*. When the language of an act is plain and clear the court is bound to assume that the legislative body that passed the act had good reason for the enactment, and simply because the court may not be able to discover or demonstrate the wisdom thereof, it is not justified in assuming that the Legislature must have meant something other or different from that which appears upon the face of the statute. Therefore, as there are not found in the third clause of section 2 any words restricting the right of removal to non-resident defendants, and as the clause expressly declares that any one or more of the defendants interested in the separable controversy between citizens of different States may remove the suit, it must be held that such is the meaning of the act; or, in other words, that in suits otherwise coming within the definitions of this third clause, a removal may be had by any one or more of the defendants interested in such separable controversy, irrespective of the question of the residence or citizenship of such defendant.

THOURON v. EAST TENNESSEE, V. & G. RY. CO.

Circuit Court, E. D. Tennessee. 1889.

38 Fed. 673.

In Equity. On motion to remand.

The complainants, who originally sued in the Chancery Court of Knox County, Tennessee, were not, except for one, citizens of

Tennessee. One defendant was a citizen of Tennessee. Another one of several defendants was a citizen of Virginia and petitioned for a removal to the proper Federal Court on the ground of prejudice and local influence. There was a removal and then a motion to remand was made.[1]

JACKSON, J.— * * * It may be true, as urged by counsel for defendant in opposition to the motion to remand, that the presence of a single resident plaintiff or complainant, though joined with other non-citizens of the State in which the suit is brought, injects into the case the poison of prejudice or local influence against which the non-resident was intended to be guarded or protected as effectually as though such resident was the sole party plaintiff; but, as the right of removal depends upon the legislation of Congress giving the authority therefor, the point to be determined is not whether cases thus situated come within the mischief to be guarded against, nor whether the judicial power of the United States is sufficient to reach such cases. This may all be conceded, and the question still remains whether under or by existing legislation on the subject of removals on account of prejudice or local influence any provision has been made which embraces or applies to suits in which there are several joint plaintiffs or co-complainants, only a portion of whom are citizens of the State in which the action is brought. In considering this question the court must observe and apply the well-settled rule for the construction of statutes that clauses of the later or present act should be given the established meaning of the earlier act from which they are copied. In so far, therefore, as the Act of March 3, 1887, copies old clauses or provisions of the Act of 1867 (subdivision 3, § 639, Rev. St.), it must be regarded as a legislative re-enactment of the meaning which the Supreme Court had previously given to these clauses. The last clause of the second section of the Act of March 3, 1887 (above quoted), which, as we think, operated as a repeal of subdivision 3, § 639, Rev. St., embodying the Act of March 2, 1867, introduces well-defined changes in the old law, such as taking from the non-resident plaintiff the right to remove, the character of the affidavit required, the court to which the application for removal is to be made, confining the right of removal upon "any defendant" being a citizen of another State who can make the requisite showing as to prejudice or local

1 The facts essential to the understanding of the portion of the case reprinted are restated.—Ed.

influence, and allowing the removal to take place, perhaps, without reference to the amount involved in the suit. But, in respect to the character of the suit and the parties thereto, the language of the two acts is the same. The Act of 1867 provided "that where a suit is now pending or may hereafter be brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," etc., the citizen of such other State, whether plaintiff or defendant, making the required affidavit, and within the time prescribed, was allowed to remove the suit. Now, the first portion of the last clause of section 2 of the Act of 1887 employs the same descriptive terms as to the suit and parties, as follows: "And where a suit is now pending or may be hereafter brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," any defendant being a citizen of another State may effect the removal in the mode and manner described. The suit described in both acts as to the parties is "between a citizen of the State in which it is brought and a citizen of another State."

In construing the Act of 1867 the Supreme Court of the United States has uniformly held that if on each side of such suit there be more than one person, then all the persons on one side must be citizens of the State in which the suit is brought, and all the parties on the other side citizens of some other State, and the latter, having the right of removal, were required to unite in the petition therefor. See Sewing-Machine Cos. Case, 18 Wall. 553; Vannevar v. Bryant, 21 Wall. 41; Society v. Grove, 101 U. S. 610, 611; Myers v. Swann, 107 U. S. 546, 2 Sup. Ct. Rep. 685; Society v. Price, 110 U. S. 61, 3 Sup. Ct. Rep. 440; Jefferson v. Driver, 117 U. S. 272, 6 Sup. Ct. Rep. 729; Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. Rep. 929; Hancock v. Holbrook, 119 U. S. 586, 7 Sup. Ct. Rep. 341. Under the rules laid down in these cases, that the removal of a cause from a State Court on the ground of prejudice or local influence could, under the Act of 1867, be had only when all the parties to the suit on one side are citizens of different States from those on the other, it is perfectly clear that the citizenship of the co-complainant in the present case would, under the former law, have defeated the right of removal, even if the Richmond & Danville Railroad Company had been the sole defendant. Under the Act of 1887, adopting the same language found in the Act of 1867, so far as the citizenship of parties on the plaintiff side of the suit is concerned, it is difficult to escape the conclusion that the same

rule would apply, and that where the citizenship on the plaintiff side of the suit is such as would prevent the removal under the Act of 1867, it would be equally effective to defeat the right under the Act of 1887.[2]

COCHRAN v. MONTGOMERY COUNTY.

Supreme Court of the United States. 1905.

199 U. S. 260, 26 S. Ct. 58, 50 L. Ed. 182.

A citizen of Alabama brought suit in an Alabama State Court against a citizen of Maryland and a citizen of Alabama, whereupon the Circuit Court for the Northern District of Alabama ordered the removal of the case on the petition of the citizen of Maryland alleging prejudice or local influence. A motion to remand was denied, and the case went to trial and judgment. That judgment was affirmed by the Circuit Court of Appeals and a writ of error from this court was thereupon prosecuted.[1]

Mr. Chief Justice Fuller delivered the opinion of the court. * * *

In the applications for removal under clauses one and two of section two of the Act of 1887, all the defendants were required to join in the application. Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245; Gableman v. Peoria, D. & E. R. Co., 179 U. S. 335. Under clause three, relating to cases of separable controversy, and clause four, all the defendants need not join. But the fourth clause, treating of removals because of prejudice or local influence, does not furnish a separate and independent ground of Federal jurisdiction, and, as Mr. Justice Bradley said in In re Pennsylvania Company, 137 U. S. 451, 456, "describes only a special case comprised in the preceding clauses." In that case we referred to the opinion of Mr. Justice Harlan in Malone v. Richmond & Dan-

[2] As to the necessity of a complete diversity of citizenship, see, contra, Bonner v. Meikle, 77 Fed. 485, 489 (1896); Holmes v. Southern Ry. Co., 125 Fed. 301 (1903); Parker v. Vanderbilt, 136 Fed. 246, 249 (1905).—Ed.

[1] The facts are restated as given in the syllabus of the case, and only a portion of the case is reprinted.—Ed.

ville Railroad Company, 35 Fed. Rep. 625, as expressing the correct view of the law. The question was whether the pecuniary limit was applicable under the fourth clause, and that involved consideration of the other clauses. Mr. Justice HARLAN there said:

"It is clear from the above clauses, construing them all together, that the right of removal, at any time before trial, on the ground of prejudice or local influence, is restricted, by the Act of 1887, to suits in which there is a controversy between citizens of different States; also that such right, in suits of that character, involving no Federal question, now belongs only to the defendant who is a citizen, or to the defendants who are citizens of a State other than that in which the suit is brought. And I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds $2,000, exclusive of interest and costs. The clauses of the second section of the Act of 1887, defining the different kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the first section, relating to the original jurisdiction of Circuit courts. This is done by the provision giving the right of removal in suits 'of which the Circuit courts of the United States are given original jurisdiction by the preceding (first) section.'

" * * * The subsequent clause, relating to prejudice and local influence, does not describe a new class of suits, removable from the State courts, but only specifies a distinct ground for removing one class of the suits previously defined, namely, that class in which there is a controversy between citizens of different States. And that ground the defendant is at liberty to set up 'at any time before the trial'; whereas, by the third section of the act, the right to remove, upon any other ground, will be lost, if not exercised at the time or before 'the defendant is required by the laws of the State or the rule of the State Court' in which the suit is brought 'to answer or plead to the declaration or complaint of the plaintiff.' The clause prescribing prejudice or local influence as ground for the removal of a suit 'in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State,' cannot well be separated, in the process of interpretation, from the preceding clause in the same section, which, by referring to the first section, requires as a condition of the removal of a suit because of diverse citizenship—the only kind of suit in which the existence of prejudice or local influ-

ence, as affecting the right of removal, is of any consequence—that the matter in dispute shall exceed in value $2,000, exclusive of interest and costs." * * *

The Circuit Court was of opinion that the words "any defendant, being such citizen of another State, may remove," etc., implied that there might be defendants who were not citizens of another State and yet the cause be removable, but while the words, standing alone, are susceptible of that construction, we think it was not intended to change the meaning of the terms as previously determined (by the decisions under the Act of 1789, and so on down), and that the class of cases removable on the ground of prejudice and local influence is confined to those in which there is a controversy between a citizen or citizens of the State in which the suit is pending and a citizen or citizens of another or other States, and that the clause did not include cases wherein the controversy was partly between citizens of the same State. To hold otherwise brings the language of the clause into conflict with the rule that a suit to be removable must be within the original jurisdiction of the Circuit Court, departs from the settled former construction, and ignores the main purpose of the Act of 1887, which was to restrict the jurisdiction of the Circuit Court. Hanrick v. Hanrick, 153 U. S. 192; Anderson v. Bowers, 43 Fed. Rep. 321; Moon on the Removal of Causes, § 189 and notes.

And there does not seem to be any escape from this conclusion in view of the provision of the first section of the Act of 1887, that when the jurisdiction is founded solely on diversity of citizenship, suit can be brought "only in the district of the plaintiff or the defendant."

If brought in the district of the plaintiff or plaintiffs, the defendant or defendants (the singular embraces the plural) must necessarily be a citizen or citizens of another State than that of plaintiff or plaintiffs. If brought in the district of defendant or defendants no removal can be had, because it is only defendants who are "non-residents" who can remove under clause two, or under clause four, prejudice or local influence not being an independent ground of jurisdiction. But in order that a defendant entitled to remove might not be cut off from the exercise of that right by his co-defendants declining to join in the application, the fourth clause provided that "any defendant" might remove, and out of abundant caution the words were added, "being such citizen of another State," apparently to prevent misconstruction of

the words "any defendant," in possible enlargement of the jurisdiction.

The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and only according it to defendants when sued in plaintiffs' district.

In the present case suit was brought in the plaintiffs' State against Cochran, a citizen of the same State, who was a necessary party, and the Surety Company, a citizen of Maryland. * * *

And this being so, the case was improvidently removed and should have been remanded.

Writ of error dismissed, certiorari granted, judgment reversed and cause remanded to Circuit Court with a direction to remand to State Court.

WHELAN v. NEW YORK, L. E. & W. R. CO.

Circuit Court, N. D. Ohio, E. D. 1888.

35 Fed. 849, 1 L. R. A. 65.

This was an action by a citizen of Ohio against three Ohio corporations and a New York corporation to enforce a joint liability imposed by State statute for personal injuries sustained by the plaintiff.[1]

JACKSON, J.—The removal in the present case cannot, therefore, be sustained under subdivision 3 of section 639, but must rest alone upon the fourth clause of amended section 2 of the act of March 3, 1887. Was the removal rightfully made under that clause? This presents the question whether a single defendant, being a citizen of a State other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same State as the plaintiff, may remove the suit to the Circuit Court upon making it appear to said court that on account of prejudice or local influence he cannot obtain justice in the State court or courts. Under former acts, as construed by the decisions

[1] The facts necessary to the understanding of that part of the case which is reprinted are restated.—Ed.

above cited, all the material parties on one side of the suit having the requisite citizenship and right of removal were required to unite in the petition therefor; but under this fourth clause of the second amended section of the act of 1887 it is provided that, where there is pending in any State Court a "suit" in which there is "a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant being such citizen of another State may remove such suit into the Circuit Court of the United States, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court," etc. The whole suit being removed by "any" defendant having the requisite citizenship, and on making the proper showing to the Circuit Court as to his inability to obtain justice in the local court on account of prejudice or local influence, "if it further appear (to said court) that said suit can be fully and justly determined, as to the other defendants, in State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said court may direct the suit to be remanded, so far as relates to such other defendants, to the State Court, to be proceeded with therein." This last paragraph of the clause clearly implies that there may be defendants to the suit, and even necessary parties, who are not entitled to remove the same; and it further contemplates and provides for a case in which the suit may be retained in the Circuit Court as against a single defendant, and, by the fair import of the language, such defendant must be the party who has effected the removal of the suit. The "other defendants" as to whom a separation may be had, and the suit remanded, under the conditions stated, cannot properly refer to the defendant at whose instance or on whose application the removal was made. If all the defendants to the suit, as under the act of 1867, are required to possess the requisite citizenship, and local prejudice must exist as to all and all must join in the petition for removal, before such removal can be properly allowed, what possible application, meaning, or effect can be given to this last paragraph of the clause? That construction of the clause would present this anomaly; that, after all the defendants had applied for and obtained a removal of the suit on account of local prejudice, the Circuit Court could still separate and remand the suit so far as it relates to some of said defendants, because, as to them, it appeared there was no local influence or prejudice. The

right to remove the suit is given to "any defendant" being a citizen of the State other than that in which the suit is brought, when it is made to appear to the Circuit Court that "he" cannot obtain justice because of local influence or prejudice. By what rule of construction is the language "any defendant" to be interpreted as meaning "all" the defendants to the suit? The natural import of the words and the whole structure of the clause admit of no such interpretation, without doing violence to the language employed. In Montelair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391, it is said:

"It is the duty of the court to give effect, if possible, to every clause and word of the statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. We should assume that the legislature was aware, when the act of April 15, 1868, was passed, that a previous statute had expressly excepted Bloomfield Township from all of its provisions. When, therefore, they declared that the new township should come under the operation of any act from which Bloomfield had been specially excepted by any proviso thereof, the established canons of statutory construction require us to presume that the Legislature understood the full legal effect of such declaration."

It must be assumed that Congress, in the enactment of this clause of the act, was aware of the fact that under the construction placed upon the prior removal acts (except perhaps the Act of 1866) all the parties on the side seeking the removal were required not only to possess the requisite citizenship, but to join in the application for such removal. When, therefore, Congress declared that "any defendant" being a citizen of another State might remove the suit upon making it appear that from prejudice or local influence he could not obtain justice, the well-settled rules of construction require the court to presume that the Legislature understood and intended the full effect of such declaration, and meant not to confine the right of removal to all, but to extend it to "any" defendant, citizen of another State, who could make "it appear to said Circuit Court" that local influence or prejudice would prevent his obtaining justice in the local form in a suit which involved a controversy between himself and the plaintiff therein. In so far as the Act of 1887 copies old clauses or provisions of former statutes, it may properly be regarded as a legislative re-enactment of the meaning which the Supreme Court had given to such clauses; but in respect to new provisions, while

they should, as far as possible, be interpreted so as to harmonize with the general scope of the act, and form a consistent whole, they are to be construed according to their plain and obvious meaning, if the language admits of no ambiguity. The last act must be taken as the law on the subject it embraced; and, "when the meaning is plain, the court cannot recur to the original statutes to see if errors were committed in revising them." Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. Rep. 929. The clause under consideration is a distinct, separate, and independent provision referring to a class of cases not embraced in or covered by the three preceding clauses of amended section 2. By the first clause of said section the right of removal is given to "the defendant or defendants," without reference to his or their citizenship. By the second clause the removal may be had "by the defendant or defendants therein being non-residents of that State." The third clause simply copies clause 2, § 2, of the Act of 1875, and relates to separable controversies in which one or more of the defendants actually interested therein may remove the suit to the Circuit Court. This third clause must manifestly receive the same construction heretofore placed upon it by the Supreme Court in numerous cases. The "defendant or defendants" on whom the rights of removal is conferred by the first and second clauses may include all the defendants, and require all to possess the right, and to unite in the application for removal. But when we come to the new provision of the fourth clause, the general terms indicative of all the parties entitled to remove are dropped or changed, and the right of removal is given to "any defendant." The language of this clause is essentially different from that of subdivision 3 of section 639, which allowed the removal on the petition of the non-resident "plaintiff or defendant,"—terms which properly described all the parties on the one side or the other of the suit, and required all on the removing side to be in position to exercise the right, and to join in the petition. When thus compared with the old law, and the three preceding clauses of said amended section 2, it seems perfectly manifest that this new (fourth), clause was intended, as its language fairly imports, as an enlargement of the rights of removal, and enables "any defendant" being a citizen of another State, between whom and the resident plaintiff in a local suit there is "a controversy," to remove the "suit" by leave of the Circuit Court upon cause shown. It is true, as claimed by counsel for plaintiff, that the general intent and purpose of the Act of 1887 was to

restrict the jurisdiction of the Federal courts, and such is the effect and operation of this new provision found in said clause 4 of amended section 2, so far as relates to the plaintiff; but, while this is so, there is clearly an enlargement of the right to remove in respect to defendants who can show that from prejudice or local influence he or they cannot obtain justice in the State Court. It is argued by counsel for plaintiffs that, inasmuch as this court could not have taken original jurisdiction of this case, it cannot acquire such jurisdiction by removal at the instance of one defendant in the suit. This position is fully met and answered in the case of Gaines v. Fuentes, 92 U. S. 10, where it was held that "the Act of Congress of March 2, 1867, in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in any State Court involving a controversy between a citizen of the State where the suit is brought and a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy when the removal is made, though that court could not have taken original cognizance of the case." Nor is the further position assumed by plaintiffs' counsel, that this new clause gives the right of removal on account of local prejudice only when there is a separable controversy between the defendant seeking the removal and the plaintiff in the State suit, well taken. The case of separable controversies is provided for by clause 3 of said amended section 2 just preceding the new provision under consideration found in clause 4. But aside from that, under previous removal acts, the local prejudice ground of removal, and the separable controversy clause, have never been treated or regarded as having any connection. Thus in Jefferson v. Driver, 117 U. S. 272, 6 Sup. Ct. Rep. 729, it was held that the provision for the removal of a separable controversy in subdivision 2 of section 639 had no application to removal under the third subdivision of said section relating to local prejudice. This was reaffirmed in Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. Rep. 929. In the new amendment to the Act of 1875, embraced in clause 4 of amended section 2, it cannot properly be assumed that Congress intended to change this line of decisions, and to make the removal provided for in said clause depend upon the existence of a separable controversy between the parties, as well as local prejudice. This construction would be to confuse two grounds or causes of removal heretofore kept distinct and disconnected. Under the provisions of this fourth clause, the whole suit is first removed, and, if it then

further appear to the court that as to the other defendants than the removing party the controversy involved may be separated, and without prejudice to any party, the suit may be severed and remanded, so far as it relates to such other defendant or defendants. The question whether there is a separable controversy as to some of the defendants is thus determined by the Circuit Court after the suit as a whole has been removed thereto by the defendant who makes the showing as to local prejudice, and asks for the transfer from the State Court. This procedure is inconsistent with the idea that a separable controversy must actually exist and be shown before "any" defendant can be allowed to remove the suit.

It was suggested on the argument of the questions presented by the pending motions, but has not been urged in the brief of counsel, that, under the grant of judicial power in the Constitution, Congress could not authorize the removal of a suit from the State Court situated as this case is, at the instance of one non-resident defendant, and thus confer upon this court jurisdiction to try the suit, in which there was also a controversy between the plaintiff and other resident defendants. This precise question has not been directly decided by the Supreme Court. It was presented and argued by distinguished counsel in the Sewing-Machine Case, 18 Wall. 558, where the parties to the suit were situated substantially the same as in the present case, so far as their citizenship was concerned; but the Supreme Court did not pass upon it, the decision having rested upon the construction of the Judiciary Act and the Act of March 2, 1867, both of which fall short of conferring upon the Circuit Court the full judicial power granted in and by the Constitution. The clause in the Constitution extending the judicial power to controversies "between citizens of different States," was intended to secure the citizen against local prejudice, which might injure him if compelled to litigate his controversy with another in the tribunals of a State not his own. This object was the avowed purpose of the constitutional provision at the time of its adoption, and the Supreme Court so declared in Gordon v. Longest, 16 Pet. 104, where it is said that "one great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress." For the attainment of this object Congress could have vested the Circuit Court with original jurisdiction in cases like

the present, although some of the defendants are residents of the same State with the plaintiff. A single Federal purpose or ground of jurisdiction would be sufficient in the exercise of the constitutional power to confer such authority. This proposition is supported by the decisions of the Supreme Court touching the Federal jurisdiction growing out of the subject-matter of the suit. Thus, in Mayor v. Cooper, 6 Wall. 247, it is said by the court: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exists, if there be a single such ingredient in the mass, it is sufficient." And, having assumed jurisdiction because of this single Federal "ingredient," the court will proceed to decide all questions in the suit of a purely local character. So under the second clause of section 2 of the Act of 1875, providing for the removal of separable controversies of a purely local nature and belonging properly to the State courts in which the suit was brought. It results necessarily, from the supremacy of the Federal Constitution, and the laws passed by Congress within the limits of the powers conferred, that a single Federal object may control the question of jurisdiction, even when the suit includes or relates to other matters or parties which come properly within the local jurisdiction. This is clearly asserted in Barney v. Latham, 103 U. S. 20, and that decision sustained the constitutionality of the Act of 1875, which, under the separable controversy clause, enabled one defendant to remove the whole suit. If a single defendant with a separable controversy may be given the right to remove the whole suit, which includes other matters of a local character, why may not a single defendant having the requisite citizenship be vested with the same right, although joined with resident defendants, when it is made to appear to the court that from prejudice or local influence he cannot obtain justice? The Federal judicial power extends as well to one case as the other, and it rests in the legislative discretion of Congress to say when and under what circumstances and conditions it shall be exercised. It would be strange, indeed, if, having the power to confer original jurisdiction in cases like the present, Congress could not lawfully give the right of removal. The statement of the court in Gaines v. Fuentes, 92 U. S. 10, that "in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with Congress to determine at what time and upon what conditions the power may be involved, whether originally in the Federal Court or after suit is brought in the State Court; and,

in the latter case, in what stage of the proceedings, whether before issue or trial by removal to a Federal Court, or after judgment upon appeal or writ of error,"—seems to leave little or no room to doubt the power of Congress to authorize the removal in the present case. The argument in favor of the power was never more forcibly and conclusively presented than by counsel for plaintiff in error in the Sewing-Machine Case, 18 Wall. 558-562. In Fisk v. Henarie, 32 Fed. Rep. 425, Judge DEADY considered and discussed this question with his usual ability and clearness, reaching the conclusion that this new legislation was clearly within the grant of judicial power conferred upon Congress in and by the Constitution. This court, after carefully re-examining the question, has no doubt that cases like the present are within the judicial power of the United States, and that by this new legislation upon the subject of removals because of local prejudice Congress intended to call such power into exercise, and allow "any defendant" possessing the requisite citizenship, and making the required showing as to local prejudice or influence, to have the suit removed to the Circuit Court. The demand sought to be enforced in such suit may be joint against two or more defendants, one of whom is a citizen of the State of the plaintiff and of the forum, while the other, being a citizen of a different State, comes within the range of the Federal judicial power. In such cases, though jointly sued with resident defendants, there is still a controversy between such non-resident defendants and the resident plaintiff, which the Federal judiciary can lay hold of and determine, although it may be so associated or connected with other local issues and matters as to require their decision also. The single Federal "ingredient" involved in such a controversy between citizens of different States comes within the grant of Federal judicial power which Congress may make effective and operative by legislation in which mode and under such conditions as may be deemed expedient. The subject which the constitutional grant of power was intended to secure was to protect the non-resident citizen against local prejudices which might injure or do him injustice. That object cannot be attained if non-resident defendants, all or any, are compelled to litigate in the forum of the plaintiff, where there exists local influence or prejudice which would prevent such defendant from obtaining justice. In every suit there is "a controversy" between the plaintiff and each of the defendants against whom relief is sought, or where, as the result of a judgment against him, any defendant is compelled to render something in favor of the plaintiff which is controverted or disputed by such defendant.

DAHLONEGA CO. v. FRANK W. HALL MERCHANDISE CO.

Supreme Court of Georgia, 1891.

88 Ga. 339, 14 S. E. 473.

Error from Superior Court. Lumpkin County; C. J. WELLBORN, Judge.

Action by the Frank W. Hall Merchandise Company, against the Dahlonega Company, limited. Defendant petitioned the Federal Court for a removal of the cause from the State Court, and an order was granted for such removal. Notwithstanding such order the State Court proceeded with the trial. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

SIMONS, J.—1. We have carefully examined the statutes enacted by the Congress of the United States on the subject of removal of causes from the State courts to the United States courts, and can find no power or authority given therein which would entitle an alien defendant whether a natural person or corporation, in a case brought against him or it in this State, to remove the case to the courts of the United States on the ground of prejudice or local influence. That part of the Act of Congress approved March 3, 1887, which authorizes the removal of causes on the ground of prejudice or local influence, is as follows: "And where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that, from prejudice or local influence, he will not be able to obtain justice in such State Court, or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause; provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded,

so far as relates to such other defendants, to the State Court, to be proceeded with therein." It is quite clear from the phraseology of this act that the right to remove a cause from a State Court, on the ground of prejudice or local influence, is confined to cases "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." Citizenship of a State must exist before a removal can be had on that ground. The word "state," as used in this act, means a State of the United States. A citizen of a territory is not a citizen of a State, nor is a citizen of the District of Columbia. Aliens and citizen of territories are therefore excluded, under this clause of the act. Speer, Rem. Causes, § 21, and note 1; also Id. Append. C, where the author says the defendant must be a citizen of another State in order to remove the case under clause 4, § 2, of the act.[1]

ADELBERT COLLEGE OF WEST. RESERVE UNIV. v. TOLEDO, ETC., RY. CO.

Circuit Court, N. D. Ohio, W. D. 1891.

47 Fed. 836.

In Equity.—Suit to assert the lien of certain equipment bonds, brought by the Adelbert College of Western Reserve University against the Toledo, Wabash & Western Railway Company, the Wabash Railway Company, the Wabash, St. Louis & Pacific Railway Company, James R. Jesup, and Isaac H. Knox, as trustees, George I. Seney, trustee, Solon Humphreys and Daniel A. Lindley, as trustees. Various other persons, holding other bonds of the same series, were made parties defendant, and set up their rights by cross-petition.

A removal to the Federal Court was obtained. It was claimed on removal that the fact that the State Supreme Court had decided the question involved in this case adversely to the interest of the defendants, while the Federal Supreme Court had decided

1 Only a portion of the opinion is reprinted.
A suit brought in a territorial court, it was held under a statute similar to section 28 of the Judicial Code, could not be removed into a Federal Court. Ames v. Colorado Cent. R. Co., 1 Fed. Cas. No. 325, p. 753, 4 Dillon, 260 (1877).—Ed.

the same question favorably thereto, showed that there existed such prejudice or local influence that the petitioners would not be able to get justice in the State Court.

Motion to remand to State Court for want of jurisdiction in this court to hear and determine the controversy between the parties.[1]

JACKSON, J.—Again it does not appear that the action of the presiding judge in ordering the removal was rested on or predicated to any extent on the alleged refusal of the Supreme Court of Ohio to recognize or follow the adjudication of the Supreme Court of the United States in the Ham Case. This conflict of opinion and decision between said courts on the question of the lien of said equipment bonds does not constitute the "prejudice or local influence" contemplated by the removal acts of Congress. The question passed upon by both courts was one of general commercial law, dependent for its proper solution upon the proper construction of the consolidating agreement under which the Toledo & Wabash Railway Company was formed, and on that question courts of concurrent jurisdiction might reach different conclusions, without subjecting either to any imputation of "prejudice or local influence." Such differences of opinion between the courts was certainly not the "prejudice or local influence" which the law contemplates as furnishing a ground or reason for removing a suit from one jurisdiction to another. Webster defines "prejudice" as follows:

"An opinion or decision of mind formed without due examination; prejudgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially, an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge."

It is in this general sense that the removal acts use the word "prejudice," and it cannot properly be applied to the solemn judgment of the highest court of a State on the mere ground that said judgment differs from that of the Supreme Court of the United States on the same question. The term "local influence," if not synonymous with "prejudice," manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in

[1] The facts are restated, and only a portion of the opinion is reprinted.—Ed.

the State courts. The "prejudice or local influence" which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice.

If in any case a State Court's decision can be made the ground of removal, it must be alleged and shown that such decision proceeded, not from error or mistake of law, but from that improper bias or unreasonable predilection which constitutes the "prejudice" or "local influence" contemplated by the law. The petition for removal in the present case alleged no such improper bias in respect to the decision of the Supreme Court of Ohio in the Compton Case, which it is said the courts will follow.[2]

CITY OF DETROIT v. DETROIT CITY RY. CO.

Circuit Court, E. D. Michigan. 1893.

54 Fed. 1.

In Equity.—Bill in the Circuit Court of Wayne County, Mich., by the City of Detroit against the Detroit City Railway Company, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William A. Muir, trustees, and the Washington Trust Company of the City of New York. The Washington Trust Company of the City of New York removed the cause to the Federal Circuit Court, and it is now on motion to remand.

One of the grounds of the motion is to the effect that the only question at issue in the suit is one of law and that such suits are not removable under the statute relating to prejudice and local influence.[1]

Taft, Circuit Judge.—They say that the only question at issue in this suit is one of law, and that questions presenting only ques-

[2] See also In re Breckenridge, 31 Neb. 489, 490-493, 48 N. W. 142 (1891). As to when prejudice or local influence exists, see, further, Barltett v. Gates, 117 Fed. 362 (1902).—Ed.

[1] The facts are restated and a portion of the opinion is omitted.—Ed.

tions of law are not removable under the statute for prejudice and local influence. It is conceded that the questions arising on the bill and answer involve simply the construction of the Constitution of the State of Michigan, and the laws and ordinances passed thereunder, and are purely of law. The contention of counsel is that the prejudice and local influence which Congress had in mind was that which would operate upon a jury, and that it never could have supposed that a State judge would be affected thereby in deciding questions of law. We are clear that this claim of counsel cannot be supported. The local prejudice clause under discussion begins with the words, "And where a suit is now pending, or which may hereafter be brought," etc. The proper limitation to be put on the meaning of this phrase has been authoritatively stated by the Supreme Court in the case of In re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. Rep. 141, where Mr. Justice BRADLEY said:

"The fourth clause (the one in question) describes only the special cases compromised in the preceding clauses. The initial words 'and where' are equivalent to the phrase 'and when in any such case.' In effect, they are tantamount to the beginning words of the third clause, namely, 'and when in any suit mentioned in this section.'"

The suits mentioned in this section are suits at law and in equity. It necessarily follows, therefore, that the local prejudice clause relates to both suits at law and in equity. The words of the clause "at any time before the trial thereof," used in fixing the time within which the removal on account of prejudice or local influence can be made, are relied on as indicating that only suits at law can be removed, because the word "trial" is properly used only with reference to such suits. This view is refuted by the foregoing language of Mr. Justice BRADLEY, and by the further fact that under the removal act of 1875, which, it is conceded, permitted the removal of causes in equity as well as at law, the same words are used to fix a time within which removals under that act could be made. When the words "trial" and "hearing" are used together, as in the removal acts of 1866 and 1867, the one refers to a trial at common law and the other to a hearing on the merits in chancery (Car Co. v. Speck, 113 U. S. 84-86, 5 Sup. Ct. Rep. 374); but when the word "trial" alone is used it includes both trial at common law and hearing in chancery as in the act of 1875.

If the prejudice and local influence clause applies to suits in

equity, then Congress must have intended to provide against the prejudice of judges as well as of juries, for there are no juries in equity. The contention on behalf of complainant is, therefore, reduced to a claim by a judge in the determination of issues of fact, but not against injustice done by him in deciding issues of law. We do not see why a judge, if influenced improperly against a party, may not yield to such influence as well in his decisions of legal questions as in his conclusions of fact.

The sole reason of the framers of the Constitution for including in the judicial power of the United States the right to decide controversies between citizens of different States was a fear of the operation of prejudice or local influence in the tribunals of one State against a citizen of another. It was thereby intended in the administration of justice, both in determining facts and in deciding the law, to secure a judiciary independent of local influences and surroundings. Recognizing this intention on the part of the framers of the Constitution, the Federal courts exercise an independence of judgment in deciding many questions of State law, and under some circumstances decline to follow the State courts. In the leading case of Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. Rep. 21, Mr. Justice Bradley, in discussing the power and duties of the Federal courts in administering State laws, spoke for the Supreme Court as follows:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, but not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of these laws. The existence of the two co-ordinate jurisdictions in the same territory is peculiar, and the result would be inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are often regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is; but where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do with reference to the doctrines of commercial law and general jurisprudence. So when contracts and

transactions have been entered into, and rights have accrued thereon in a particular State of the decisions, or when there is no decision of the State tribunal, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted in the State courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflicts with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

We could have no better evidence than this that one of the objects of the makers of the Constitution, in conferring judicial power in controversies between citizens of different States, was to avoid possible injustice to nonresident litigants from the influence of local prejudice on decisions by State courts on pure questions of law. But it is said we are considering a statute, and not the Constitution. That is true, but the reason for conferring a constitutional power, and its scope and object, are of controlling importance in construing a statute passed in the exercise of the power. In cases where the right to sue in the Federal courts, or the right to remove cases to them, is made to depend only on the fact of diverse citizenship, Congress merely assumes the existence of local prejudice, and provides against its dangers to nonresidents, without regard to the actual fact, while in the clause under discussion, Congress puts on him who would enjoy its benefit the burden of an affirmative showing. But in either case the evil sought to be avoided by the act of Congress was the same as that which led the makers of the Constitution to confer the power to pass the act,—possible injustice to nonresident litigants from prejudiced opinions of law as well as from prejudiced conclusions of fact. Neither authority nor Federal statute has been cited

which makes the distinction between questions of law and questions of fact contended for. If it was the intention of Congress to so limit the right of removal, it could have expressed itself in language not to be mistaken, and would not have left the limitation to be inferred from an argumentative construction, which finds no basis either in the words used or in the reason of the provision. * * *

Counsel contend that, inasmuch as a decision of the Wayne Circuit Court involves only a question of law which the defendant trust company, in the event of an adverse decree, can carry to the Supreme Court of the State, no showing can be sufficient which does not tend to prove that the decision of the Supreme Court also will be affected by prejudice and local influence. We do not agree in this view. It rests on the false premise that no injury is done to a party litigant when a court of original jurisdiction, swayed by prejudice or local influence, decides against him, if the case involves only an appealable question of law. He is entitled, on general principles, to have his rights justly determined in every tribunal whose aid or protection the law gives him, no matter whether the judgment is to depend on disputed facts or law. It is an injustice to him to be compelled to appeal to a higher court to right a wrong done him by the prejudice of the trial judge.

PARKER v. VANDERBILT.

Circuit Court, W. D. North Carolina. 1905.

136 Fed. 246.

Pritchard, Circuit Judge.—This case was removed from the Superior Court of Buncombe County to the Circuit Court of the United States, on account of prejudice and local influence, on September 19, 1904. The plaintiff made a motion to remand same to the State Court on the 11th day of March, 1904, upon the ground that the defendant Brantly was at the time of the institution of the suit a resident of North Carolina; also that the petition was not properly verified, and did not contain facts sufficient to justify a removal, and for other reasons which are fully discussed in the opinion. * * *

It is also contended that the defendant is required to show that

he cannot obtain justice in the counties to which this case might be removed by the State Court. This would be true if the defendant had the right, under the laws of the State, to have his case removed to any of the contiguous counties for trial, but no such right exists. The statute of the State leaves the question as to whether there shall be a change of venue to the discretion of the judge of such court. Therefore the defendant does not have such a right as contemplated by the statute to have his case tried in a county other than the one in which the suit was instituted. Such being the law of the State in regard to a change of venue, the defendant is not required to show that he cannot obtain justice in the counties to which his case might be removed by the State Court. Robison v. Hardy (C. C.), 38 Fed. 49; Rike v. Floyd (C. C.), 42 Fed. 247; Smith v. Lumber Co. (C. C.), 46 Fed. 819; Crosby Lumber Co. v. Smith, 51 Fed. 63, 2 C. C. A. 97; City of Tacoma v. Wright (C. C.), 84 Fed. 836.[1]

FISK v. HENARIE.

Supreme Court of the United States. 1892.

142 U. S. 459, 12 S. Ct. 207, 35 L. Ed. 1080.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.[2]

After this case had been pending in the State courts from November 13, 1883, to August 1, 1887; had been tried three times before a jury in the Circuit Court, there being one verdict for defendants, one for plaintiff and one disagreement; and been heard in various phases three times in the Supreme Court of the State, the application was made for removal. Was this application in time? This question is to be determined upon a proper construction of section 2 of the Act of Congress of March 3, 1887, for it is not, and could not be, contended that the right of removal could then have been invoked on the ground of diverse citizenship. The application was filed July 30, 1887, and by its terms purported

1 Only a portion of the opinion is reprinted.

If the defendant has no right to remove the case to any lower state court where he could get an unprejudiced trial, the mere fact that he will be able to appeal from the decision of the lower court to the State Supreme Court, where the proceedings will be unprejudiced, will not prevent a removal to the Federal Court. City of Detroit v. Detroit City Ry. Co., 54 Fed. 1, 14 (1893).—Ed.

2 Only a portion of the opinion is reprinted.—Ed.

to be made under the Act of 1887, to which act the order of the State Court referred. Indeed, if subdivision 3 of section 639 of the Revised Statutes were repealed by the Act of 1887, or, since some of the defendants were then and at the commencement of the suit citizens of the same State as the plaintiff, if a removal could be had at all, it could only be under the act of 1887.

The Judiciary Act of 1789, 1 Stat. c. 20, § 12, pp. 73, 79, provided that a party entitled to remove a cause should file his petition for such removal "at the time of entering his appearance in such State Court." 1 Stat. 79.

The Act of July 27, 1866, relating to separable controversies, provided that "the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause," etc. 14 Stat. 306, c. 288.

The Act of March 2, 1867, relating to removal on the ground of prejudice or local influence, provided that the plaintiff or defendant "may, at any time before the final hearing or trial of the suit, file a petition in such State Court for the removal of the suit," etc. 14 Stat. 558, c. 196.

The first subdivision of section 639 of the Revised Statutes was a re-enactment of the 12th section of the Judiciary Act; the second subdivision, of the Act of July 27, 1866; and the third subdivision, of the Act of March 2, 1867; and this subdivision adopted the phraseology of the Act of July 27, 1866, namely: "At any time before the trial or final hearing" of the suit.

The Act of March 3, 1875, said nothing about prejudice or local influence, but provided in the case of diverse citizenship that the party desiring to remove a cause should make and file his petition in the State Court "before or at the term at which said cause could be first tried and before the trial thereof." 18 Stat. 470, 471, c. 137.

This act repealed the first and second subdivisions of section 639 of the Revised Statutes, but left subdivision 3 unrepealed. Baltimore & Ohio Railroad v. Bates, 119 U. S. 464, 467.

In Insurance Company v. Dunn, 19 Wall. 214, it was held that the word "final" as used in the phrase "at any time before the final hearing or trial of the suit" applied to the word "trial" as well as to the word "hearing." And it has been often ruled that if the trial court had set aside a verdict and granted a new trial, or if the Appellate Court had reversed the judgment and remanded the case for trial *de novo,* it was not too late to apply to remove

the cause under the Act of 1867 and subdivision 3. Vannevar v. Bryant, 21 Wall. 41; Jifkins v. Sweetzer, 102 U. S. 177; Baltimore & Ohio Railroad v. Bates, 119 U. S. 464, 467, and cases cited. But these and like decisions were inapplicable to proceedings under the Act of 1875, as the petition was thereby required to be filed "before or at the term at which said cause could be first tried and before the trial thereof." This has been construed to mean the first term at which the cause is in law triable—the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after the hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action. Gregory v. Hartley, 113 U. S. 742, 746; Alley v. Nott, 111 U. S. 472; Laidly v. Huntington, 121 U. S. 179.

The Act of March 3, 1887, 24 Stat. 552, c. 373, and also as corrected by the Act of August 13, 1888, 25 Stat. 433, 435, c. 866, provided that "any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court, or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

In view of the repeated decisions of this court in exposition of the acts of 1866, 1867 and 1875, it is not to be doubted that Congress, recognizing the interpretation placed on the word "final," in the connection in which it was used in the prior acts, and the settled construction of the Act of 1875, deliberately changed the language, "at any time before the final hearing or trial of the suit," or "at any time before the trial or final hearing of the cause," to read: "at any time before the trial thereof," as in the Act of 1875, which required the petition to be filed before or at the term at which the cause could first be tried, and before the trial thereof. * * *

We are of opinion that the application for removal came too late. The judgment must therefore be

Reversed, and the cause remanded to the Circuit Court, with a direction to remand it to the State Court.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE FIELD, dissenting.

MR. JUSTICE FIELD and myself do not concur in the construction which the court places upon the Act of 1887.

Section three of that act, requiring the petition for removal to be filed in the State Court, "at the time, or at any time before the defendant is required by the laws of the State or the rule of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff," excepts from its operation the cases mentioned in the last clause of section two, namely, those in which a removal is asked upon the ground of prejudice or local influence. As to the latter cases, the statute provides that the removal may be had, upon a proper showing, "at any time before the trial." This means, at any time before a trial in which, by a final judgment, the rights of the parties are determined. Under the Act of 1887, there can be no removal, upon the ground of prejudice or local influence, unless it be made to appear to the Circuit Court of the United States that, on account of such prejudice or local influence, the defendant citizen of another State cannot obtain justice in the State courts. The existence of such prejudice or local influence is often disclosed by a trial in the State Court in which the verdict or judgment is set aside. The fact of prejudice or local influence may be established by overwhelming evidence; still, under the decision of the court, there can be no removal if the application for removal be not made before the first trial. We do not mean to say that when a trial is in progress the cause may be removed before its termination, even upon the ground of prejudice or local influence. But, if at the time the application is made the cause is not on trial and is undetermined, that is, has not been effectively tried, the Act of 1887, in our judgment, authorizes a removal, on proper showing, upon the ground of prejudice or local influence, although there may have been a trial, resulting in a verdict which has been set aside.

The error, we think, in the opinion of the court, is in applying to the Act of 1887 the decisions under the Act of 1875. The words in the latter act limiting the time within which the application for a removal must be made—"before or at the term at which said cause could be first tried, and before the trial thereof"—necessarily meant, as this court has held, the first trial, whether it resulted in a verdict or not, and although the verdict and judgment may have been set aside; because the express requirement was that the application for removal must, in any event, be made be-

fore or at the term at which said cause could be first tried. No such requirement is found in the Act of 1887, in respect to cases sought to be removed upon the ground of prejudice or local influence. While, in respect to all cases of removal except those upon the ground of prejudice or local influence, the latter statute provides that the application shall be made at the time, or at any time before the defendant is required by the laws of the State, or the rule of the State Court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, the removal, because of prejudice or local influence, may be applied for "at any time before the trial thereof." This difference in the language of the two acts means, we think, something more than the court attributes to it. Congress could hardly have intended to give the defendant citizen of another State simply the time between his answering or pleading, and the calling of his case for the first trial thereof, to determine whether he should apply for a removal upon the ground of prejudice or local influence. In our judgment, it meant to give the right of removal, upon such ground, at any time, when the case is not actually on trial, and when there is in force no judgment fixing the rights of the parties in the suit. If a case is open for trial, on the merits, an application for its removal before that trial commences is made "before the trial thereof." In our opinion, the interpretation adopted by the court defeats the purpose which Congress had in view for the protection of persons sued elsewhere than in the State of which they are citizens.[3]

WHELAN v. NEW YORK L. E. & W. R. CO.

Circuit Court, N. D. Ohio, E. D. 1888.

35 Fed. 849, 1 L. R. A. 65.

JACKSON, J. * * * It is further contended that no proper proceedings have been had or taken by the defendant, even conceding

3 In accord with the dissenting opinion, see Fisk v. Henarie, 32 Fed. 417, 427-428 (1887); Huskins v. Cincinnati, N. O. & T. P. Ry. Co., 37 Fed. 504, 506-507, 3 L. R. A. 545, 548 (1889); Brodhead v. Shoemaker, 44 Fed. 518, 523-526, 11 L. R. A. 567, 569-572 (1890).

As to when it must be shown that the prejudice actually existed, see Metropolitan Life Ins. Co. of New York v. Ethier, 44 Mich. 144, 6 N. W. 201 (1880).—Ed.

its right of removal, to effect such removal. By the third section of the Act of 1887 the steps required to be taken in removal cases generally are indicated, but that section excepts from its operation cases sought to be removed on the ground of local prejudice, in respect to which clause 4 of amended section 2 prescribed no mode or method of effecting that class of removals. What procedure may, then, be adopted by the party seeking or entitled to remove under this clause? In conferring the right Congress certainly intended that some process for its exercise should be within the reach of the party so entitled. We think the method or procedure for effectuating the right so conferred by said clause may be found in the two paragraphs of section 639, Rev. St., which succeed the third subdivision of said section. These two paragraphs prescribing the method of accomplishing removals are not in conflict with the Act of 1887, and may therefore be considered as still in force, and as furnishing the proper and appropriate remedy to be employed by the party seeking a removal, and in making it "appear to said Circuit Court that from prejudice or local influence" he will not be able to obtain justice in the State courts. It is not indicated, in the Act of 1887, how, or in what manner, the fact that the removing party cannot obtain justice in the local courts on account of such prejudice or local influence shall be made "to appear" to the Circuit Court. Judge Deady, in Fisk v. Henarie, 32 Fed. Rep. 417-421 (Nov. 29, 1887), held that the last clause of section 639, Rev. St., which immediately follows subdivision 3 of said section, might reasonably be looked to as furnishing the machinery for making it "appear to the Circuit Court that the petitioning party could not obtain justice in the State Court because of prejudice or local influence. If this suggestion of that learned judge, in which I concur, is not deemed correct, then, in the absence of all provision as to the method or mode of presenting the application for removal, this court would be left free to adopt proper and suitable rules, prescribing and regulating the practice in such cases; and such rules would naturally be made to conform to the practice and procedure heretofore in force in like cases. In either view of the subject, we think the mode adopted by the defendant in this case is not open to any serious objection. A formal petition, properly sworn to, was duly presented to this court, setting forth all the conditions required by the act to entitle said defendant to remove the suit. This petition was accompanied and supported by the affidavit of the proper officer of the defendant company, stating, not what the affiant had

reason to and did believe in respect to the existence of local prejudice, but in direct terms, and in the very language of the act, "that from prejudice and local influence said railroad company will not be able to obtain justice in said courts of common pleas, or in any other State Court to which it has, under laws of the State of Ohio, a right, on account of such prejudice or local influence, to remove said cause," etc. This made a *prima facie* showing as to what was required "to be made to appear to the Circuit Court."

But it is insisted on behalf of the plaintiff that this is not a sufficient showing to warrant this court in declaring that said defendant was entitled to remove the suit, and in assuming jurisdiction thereof. His counsel claim that the fact of prejudice or local influence which must be made "to appear" to the Circuit Court as one of the conditions on which the right of removal depends, involves a judicial investigation; that there can be no *ex parte* action in the matter; and that in such cases the plaintiff is entitled to notice of the application, and an opportunity to contest and put in issue the grounds on which the removal is sought. In other words, that he has the right under said provision of the act to make up an issue on the question of prejudice or local influence, and have this court formally try that issue before determining whether it will sanction the removal and assume jurisdiction. The plaintiff, as a part of his motion to remand, denies the existence of such prejudice or local influence, and demands a trial of that issue. If he is entitled to have such a preliminary trial, his motion to remand would, of course, have to await the result of that investigation, unless other grounds exist on which to rest the motion. It is conceded by counsel for plaintiff that by the old law and the practice under it the State courts to which applications for removal were addressed never entered or were authorized to enter upon such an investigation as he herein demands of this court, before taking action thereon. Under the third subdivision of section 639, Rev. St., based on the Act of March 2, 1867, amending the Act of July 27, 1866, the general statement made in the affidavit of the petitioners was considered sufficient, without any detailed setting forth of the facts which constituted the reasons of his belief. He was not required to prove these statements as facts, or affirmatively to show, except by the affidavit, that he could not obtain justice in the State Court. It was always held to be enough if, under oath, he stated the reasons which the statute assigned as the ground for the removal. Bowen v. Chase, 7

Blatchf. 255. A party may always, in proper way and time, put in issue jurisdictional facts, such as citizenship of the opposing side, and rightfully demand a trial thereon; but statutory requirements, which form a part, even an indispensable part, of the process of removing a suit from State to Federal courts, in any or all of the cases mentioned in the last or former acts of Congress, while they must be complied with in order to perfect the right to remove, are not to be confounded with jurisdictional facts on which a trial by proper pleadings may be demanded. The right to removal depends upon the statute giving the authority therefor, and not upon the legislation which defines the original jurisdiction of the Circuit courts of the United States, and should not therefore be restricted or limited by the latter legislation. Green v. Custard, 23 How. 484, and Bushnell v. Kennedy, 9 Wall. 387.

In conferring upon the Circuit Court of the United States the authority to act upon the application for removal of suits from State courts Congress certainly never intended to make the question as to the existence or non-existence of prejudice or local influence, which would prevent a non-resident citizen defendant from obtaining justice in the local courts, a jurisdictional fact, such as would entitle the side opposing the removal to dispute the truth, and put the matter in issue for formal trial. The requirement of the statute that, under certain conditions therein stated, a party defendant may have the suit removed to this court "when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court," constitutes nothing more than a part of the process of removing the suit. Steps forming a part of such process of removal under no previous statute were ever regarded as issuable; and the subject-matter of a preliminary trial, before application for removal, could be properly acted upon. The distinction between jurisdictional facts, properly speaking, which may be made the subject of issue or trial, and model and formal requirements to the exercise of the right of removal, is clearly pointed out by Mr. Justice Bradley, speaking for the court, in Ayers v. Watson, 113 U. S. 597, 598, 5 Sup. Ct. Rep. 641. Model requirements and conditions prescribed by statute in order to exercise the right of removal may be waived, but jurisdictional facts proper cannot be. French v. Hay, 22 Wall. 238; Ayers v. Watson, 113 U. S. 594, 5 Sup. Ct. Rep. 641; Railroad Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. Rep. 1127, Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. Rep. 1113. The construction which plaintiffs' counsel contend

should be placed upon this provision of the act would be a radical departure from the judicial legislation of Congress since the foundations of the Government and of the practice thereunder, and would involve on the part of this court the exercise of the most unseemly and indelicate functions and duties, which could not fail to excite jealousies, and create hostilities against the Federal judiciary, and disturb that comity and respectful consideration which should ever exist between the courts of the United States. It is urged by plaintiffs' counsel that the provision for removing the suit, "when it shall be made to appear to said Circuit Court," are new words not previously used in any statute on this subject, and should be interpreted according to their common and usual signification; being evidently employed for the purpose (as contended) of requiring a finding by the court upon the evidence taken according to the form of law, and in such manner that both sides can be heard. This position, which is only a restatement of the proposition already noticed, assumes that the question of local prejudice and the right to remove the suit therefore is a proceeding between the parties to the action; that the right of removal involves a matter of controversy between the plaintiff and the defendant seeking such removal. This assumption is not well founded; neither is it correct, as claimed, that the words, "when it shall be made to appear to said Circuit Court," are so new and different from those previously employed in the legislation of Congress on the subject of removals, as to indicate an intention to completely change the method and practice in effecting removals.

The twelfth section of the Judiciary Act of 1789 provided that "if a suit be commenced in a State Court against an alien or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum of $500, exclusive of costs, to be made to appear to the satisfaction of the court," the defendant party might, on entering his appearance, and by the process specified in the section, cause the suit to be removed "for trial to the next Circuit Court to be held in the district where the suit is pending." While this section was in force, Longest sued Gordon in the State Court of Kentucky. On entering his appearance, the defendant filed his petition to remove the cause to the Circuit Court of the United States for the District of Kentucky, on the ground that he was a citizen of Pennsylvania and the plaintiff a citizen of Kentucky. The citi-

zenship of the parties, as alleged, was admitted; but the plaintiff resisted the removal, and the State Court refused to allow it on the ground that "it did not appear to its satisfaction that the amount in controversy exceeded $500 exclusive of costs." The Supreme Court of the United States, in Gordon v. Longest, 16 Pet. 97, held this action of the State Court was erroneous. The plaintiff, in his declaration or petition, having laid his damages at $1,000, the State Court could not properly go into a consideration of the amount involved in order to be satisfied that it exceeded $500 before allowing the prayer of the petition for removal. Again, by section 643, Rev. St., embodying parts of acts of Congress enacted in 1833, 1866, and 1871, relating to the removal of civil suits or criminal prosecutions commenced in State courts against revenue officers of the United States, or against officers acting under the authority of Federal election laws, it is provided, among other things (paragraph 7), that if, upon the removal of such suit or prosecution, "it is made to appear to the Circuit Court" that no copy of the record and proceedings therein in the State Court can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo,* etc. It would hardly be asserted that before the Circuit Court could require the plaintiff to proceed *de novo* under this provision of the statutes, that it would be compelled to enter upon a formal investigation or trial of the question whether a copy of the State record could be obtained. Under this section the Circuit Court to which the defendant seeking the removal presents his petition in the first instance, decided every question relating to the sufficiency of the petition, affidavit, and accompanying certificate, and its own jurisdiction in the matter. Denniston v. Draper, 5 Blatchf. 336. And if the petition, upon its face, shows a case within the terms of the section, the suit or prosecution is *ipso facto* removed into the Circuit Court, and the jurisdiction of the State Court is at an end. It may be remarked in passing, that this section, whose constitutionality was upheld in Tennessee v. Davis, 100 U. S. 257, applied both to civil and criminal cases, and included any case that comes within its terms, without reference to the amount in dispute, if the suit be of a civil nature. Wood v. Matthews, 2 Blatchf. 370. And the suit or prosecution, when actually removed from the State Court by the defendant's officer, goes as a whole to the Circuit Court, with all the parties thereto. Fisk v. Railroad Co., 6 Blatchf. 362. It will be noticed that the fourth clause of

the second amended section of the Act of 1887 has several features in common with this section of the Revised Statutes. But again, by section 5 of the Act of March 3, 1875, it is provided "that if, in any suit commenced in the Circuit Court, or removed from a State Court to a Circuit Court, of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," etc., it shall proceed no further therein, but shall dismiss or remand the same. Here the language is, "if it shall appear to the satisfaction of said Circuit Court" that certain jurisdictional facts are wanting, the court is required to proceed no further, but these terms were never held to impose upon the court the duty of trying any or all collateral facts or issues that could possibly be raised touching the steps or proceedings had in effecting removals, which fell short of the question of its actual jurisdiction.

By the fourth clause of amended section 2 of the Act of 1887 the removal is to be had "when it shall be made to appear to said Circuit" that such prejudice or local influence exists in the State Court or courts as will prevent the petitioning defendant, being a citizen of a State other than that in which the suit is brought from obtaining justice. This certainly does not properly involve or require the investigation and judicial establishment of a fact which the plaintiff in the suit is given the right to controvert. The statute makes no provision for giving notice to the plaintiff of the application to remove, and the petitioning party has not heretofore been required, either by the statute or the practice of the courts, to which petitions for removal were addressed, to give any notice to the adverse party of his application for such removal of a suit from the State Court. Wehl v. Wald, 17 Blatchf. 342, and Stevens v. Richardson, 9 Fed. Rep. 194, where it is said by Judge BLATCHFORD that "it has always been held in this court that no notice (of the application for removal) was necessary;" citing Fisk v. Railroad Co., 8 Blatchf. 243. No notice of the application for removal being required, it results necessarily that the court which acts upon such application must proceed upon the ex parte *prima facie* showing made by the petition and affidavit accompanying the same, leaving to the adverse party the right to question by proper plea in the Circuit Court the strictly jurisdictional facts presented in the application. Barry v. Ed-

munds, 116 U. S. 559, 6 Sup. Ct. Rep. 501, relied on by the plaintiff's counsel, is not in conflict with these propositions. In that case the court does recognize that the jurisdictional facts embraced in section 5 of the Act of 1875 may, by proper pleading, and at the proper time, be put in issue, and a trial had thereon. That section created certain new jurisdictional facts proper on which issue could be taken by the adverse party. But no such effect can be given to the requirements of the present law in designating the time and mode of effecting the removal.

Under this Act of 1887 the Circuit Court is invested with the authority heretofore conferred upon and exercised by the State courts in acting upon application for removal, and has imposed upon it the further authority of directing the suit to be remanded so far as relates to defendants other than the one applying for the removal, "when it appears" to said court that said suit can be fully and justly determined as to such other defendants in the State Court, without being affected by local prejudice, and no party to the suit will be prejudiced by a separation of the parties. Can it, with any show of propriety or reason, be asserted that this proviso to the fourth clause of said section contemplates a further or additional trial inter partes of the question whether such separation of the parties shall be directed, and the suit remanded as to some of the defendants and retained as to others? This language of the proviso, "if it further appear" (to said Circuit Court), indicates a judicial investigation and finding, just as much as the words used in the first part of the clause, "when it shall be made to appear to said Circuit Court." The one no more implies a proceeding between the parties than the other; and it was clearly not the intention of Congress to require a preliminary trial of the question as to separating the parties and remanding the suit, so far as relates to some of the defendants, while retaining it as to others. Such a practice would involve innumerable collateral issues, and lead to inextricable confusion in the due and orderly administration and disposition of the business of the court.[1]

[1] Only a portion of the opinion is reprinted.

Compare, as to the necessity of giving notice, Carson & Rand Lumber Co. v. Holtzclaw, 39 Fed. 578, 580 (1889); Herndon v. Southern R. Co., 73 Fed. 307 (1896).

As to the right of the plaintiff, who was not given notice, to contest the allegations of the petition upon which a removal was obtained, see Ellison v. Louisville & N. R. Co., 112 Fed. 805, 50 C. C. A. 530 (1902).—Ed.

In re PENNSYLVANIA CO.

Supreme Court of the United States. 1890.

137 U. S. 451, 11 S. Ct. 141, 34 L. Ed. 738.

MR. JUSTICE BRADLEY delivered the opinion of the court. * * *

There is another question raised in this case, on which it is proper that we should express our opinion. It arises upon the following words of the act: "When it shall be made to appear to said Circuit Court that from prejudice," etc. How must it be made to appear that from prejudice or local influence the defendant will not be able to obtain justice in the State Court? The Act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the State Court. Rev. Stat. § 639, Subdiv. Third. By the Act of 1887 it must be made to appear to the court. On this point, also, various opinions have been expressed in the Circuit courts. Our opinion is, that the Circuit Court must be legally (not merely morally) satisfied of the truth of the allegation, that, from prejudice or local influence, the defendant will not be able to obtain justice in the State Court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as prima facie proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the Circuit Court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other State Court to which, etc. We do not say that, as a

matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient.

The petition for mandamus is denied.[1]

ST. JOHN v. TAINTOR.

District Court, S. D. New York. 1915.

220 Fed. 457.

Augustus N. Hand, District Judge.—The plaintiff, a citizen and resident of Wyoming, sued the defendant, a citizen and resident of New York, in the Montana State Court. The cause was removed to United States District Court for the Southern District of New York, and the plaintiff now appears specially and moves to remand. The motion must be granted.

Section 29 of the Judicial Code is perfectly clear, and furnishes the only provision of law applicable to this case. It says that the party entitled to remove "any suit mentioned in the last preceding section" shall file a petition "for the removal of such suit into the District Court to be held in the district where such suit is pending." These words indubitably specify the District Court where the suit is pending as "the proper district" referred to in the preceding section 28 of the Judicial Code.

The present statutes relating to removal of causes have been carried forward from sections 2 and 3 of the Judiciary Act of 1875, and from the later Judiciary Act of 1888. The Act of 1875 was construed in the case of Knowlton v. Congress & Empire Spring Co., 13 Blatchf. 170, Fed. Cas. No. 7,902, and the Act of 1888 in the case of Hyde v. Victoria Land Co. (C. C.) 125 Fed. 970. See, also, the language of the Supreme Court in Ex parte State Insurance Co., 18 Wall. 417, 21 L. Ed. 904. Judge Rose, in the case of St. John v. United States Fidelity & Guaranty Co. (D. C.) 213 Fed. 685, has decided the exact question under the

[1] Only a portion of the opinion is reprinted.
In the following cases it was held that it had been properly made to appear to the court that the defendant would not be able to obtain justice in the state courts: Cooper v. Richmond & D. R. Co., 42 Fed. 697, 698-700 (1890); Walcott v. Watson, 46 Fed. 529, 531-532 (1891); Franz v. Wahl, 81 Fed. 9, 10 (1897).—Ed.

present statute in accordance with the views which I have expressed.

The dictum of Judge RAY in Mattison v. Boston & Main R. R. Co. (D. C.) 205 Fed. 821, and the decision of Judge Toulmin in Stewart v. Cybur Lumber Co. (D. C.) 211 Fed. 343, seem to me irreconcilable with the language of the statute, the former decisions under the acts of which the present law is a practical codification, and also with what I conceive to be the object of the law, namely, to enable a party sued by a citizen of another State to be relieved from local prejudices, which have been thought more likely to exist when the suit was brought against a party in the courts of the former's own State. It is to be noted that neither of these cases even mentions the express provisions of the statute that the removal is to be into the court "to be held in the district where such suit is pending."

It is not to be supposed that a citizen of Wyoming would encounter local prejudice in suing a citizen of New York in the courts of the State of Montana.[1]

MARTIN v. BALTIMORE & OHIO RAILROAD.

Supreme Court of the United States. 1894.

151 U. S. 673, 14 S. Ct. 533, 38 L. Ed. 311.

This was an action of trespass on the case, brought March 1, 1888, in the Circuit Court of Berkeley County in the State of West Virginia, by John W. Martin against the Baltimore and Ohio Railroad Company, to recover damages in the sum of $10,000 for personal injuries caused to the plaintiff by the defendant's negligence at Bayview in the State of Maryland on May 22, 1887.

On April 12, 1888, the defendant filed in that court a petition, with proper affidavit and bond, for the removal of the case into the Circuit Court of the United States for the District of West Virginia, upon the ground that at the commencement of the suit and ever since the plaintiff was a citizen of West Virginia and the

[1] Compare very carefully, Park Square Automobile Station v. American Locomotive Co., 222 Fed. 979, 982-994 (1915); Fairview Fluospar & Lead Co. v. Bethlehem Steel Co., 258 Fed. 681, 683-688 (1919); Sanders v. Western Union Telegraph Co., 261 Fed. 697 (1919).

See also Hyde v. Victoria Land Co., 125 Fed. 970 (1903).—Ed.

defendant a corporation and citizen of Maryland. On April 24, 1888, the plaintiff was permitted by the State Court, against the defendant's objection, to file an answer to the petition for removal, denying that the defendant was a non-resident corporation, and alleging that it was, for all the purposes of this suit, a resident of West Virginia, and therefore not entitled to remove the case; and the court, upon a hearing on that petition and answer, "taking judicial notice of the statutes incorporating the defendant in Virginia and in this State, and being of opinion that said Baltimore & Ohio Railroad Company is not a non-resident corporation," refused to allow the removal.

But the Circuit Court of the United States, on June 11, 1888, upon the production by the defendant of a duly certified copy of the record of the above proceedings, ordered the case to be docketed in that court; and on July 23, 1888, ordered it to be removed into that court.

On December 13, 1888, the plaintiff filed in that court a plea (called in the record a plea in abatement), that it ought not to take further cognizance of the action, because before and at the time of the removal the defendant "was and is now a resident of the District of West Virginia, and is therefore not entitled to remove said action" to that court. A demurrer to that plea was filed by the defendant, and sustained by the court. "And thereupon," as the record stated, "the plaintiff moved to remand this action to the Circuit Court of Berkeley County, which motion the court overruled."

The defendant then pleaded not guilty. Upon the issue joined on this plea, the case was tried by a jury, the plaintiff and other witnesses testified under instructions of the court, and judgment was rendered upon the verdict.

The plaintiff duly excepted to those instructions, and sued out this writ of error, which was entered in this court on January 13, 1890, together with an assignment of errors, in which the only error assigned to the sustaining of the demurrer to the plaintiff's plea, or to the denial of his motion to remand, was as follows: "The Circuit Court erred in sustaining the demurrer of the said defendant in error to the plaintiff's plea in abatement, and in overruling the motion of the plaintiff in error to remand the said cause to the State Court whence it had been removed to said Circuit Court of the United States, thus deciding, both in sustaining said demurrer and in overruling said motion, that the Baltimore and

Ohio Railroad Company was a non-resident of West Virginia and entitled to remove.

The other errors assigned were in rulings and instructions at later stages of the case, which it will not be necessary to consider.

At the present term of this court, the plaintiff's death was suggested, and Gerling, his administrator, appointed by the County Court of Berkeley County in West Virginia, came in to prosecute in his stead; and the defendant moved to dismiss the writ of error, because an action for personal injuries abated by the death of the plaintiff.

It was argued, in behalf of the administrator, that the removal from the State Court gave the Circuit Court of the United States no jurisdiction of this case, for two reasons: 1st. That the Baltimore and Ohio Railroad Company was a resident corporation of the State of West Virginia; 2nd. That the application to the State Court for removal was not made in time.[1] * * *

The other objection taken in argument to the validity of the removal of the case into the Circuit Court of the United States is that the petition for removal was not seasonably filed in the State Court under the provision of the Act of Congress of 1887, by which any party, entitled to remove such a suit from a State Court into the Circuit Court of the United States, "may make and file a petition in such suit in such State Court at the time, or any time before, the defendant is required by the laws of the State, or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. 554.

The original summons in this case was issued by the State Court on March 3, 1888, returnable at the rules to be held on the first Monday of March, 1888, which was March 5, and was served, as appeared by the officer's return, at 11 A. M. of March 5, the statutes of the State providing that "any process may be executed on or before the return day thereof." W. Va. Code of 1884, c. 124, § 2.

On the record of that court were the following minutes: "March rules, 1888: Declaration filed and common order. April rules, 1888: Common order confirmed and W. E."

The meaning of these minutes is that the plaintiff, having filed his declaration at the rule day on which the summons was returnable, and the defendant having failed to appear on that day, there was thereupon entered in the clerk's office, as authorized by the

[1] Only that part of the opinion dealing with the second point is reprinted. —Ed.

statutes of the State, a conditional judgment or judgment *nisi*, known as the "common order," that judgment be entered for the plaintiff unless the defendant should appear and plead at the next rules; and at April rules, the defendant continuing in default, the clerk entered, pursuant to those statutes, an office judgment, confirming the former one, with an order or writ of enquiry of damages. W. Va. Code, c. 125 §§ 1, 6; 4 Minor's Institutes, 599, 601.

By the statutes and practice of the State, this office judgment would, if not set aside, become a final judgment on, and not before, the last day of the next succeeding term. But the defendant might, at any time before the end of that term, "appear and plead to issue," that is to say, answer to the merits of the action, either by plea in bar, or by demurrer; and, if he did so appear and plead within that time, the office judgment, not having been entered up in court, nor the writ or order of enquiry executed, would be set as of course, and the case stand for trial upon the merits. In short, either judgment in the clerk's office was merely a formal judgment of default, not affecting the defendant's absolute right to interpose any defense upon the merits. But at a subsequent term, or if the office judgment had been confirmed by the court, or the writ of enquiry executed, he could not, without leave of court, file any plea whatever. A plea to the jurisdiction, or in abatement, if it could have been filed after the common order or conditional judgment in the clerk's office, certainly could not have been filed, without special leave of the court, after the office judgment confirming that order; and therefore in this case, upon the most liberal construction possible, not after the April rules. W. Va. Code, c. 125, §§ 16, 46, 47; 4 Minor's Institutes, 601, 605; Resler v. Shehee, 1 Cranch 110; Furniss v. Ellis, 2 Brock. 14; Hinton v. Ballard, 3 W. Va. 682; Delaplain v. Armstrong, 21 W. Va. 211.

The defendant's petition for the removal of the case into the Circuit Court of the United States was not filed at the rules, either in March or in April. But it was afterwards filed in and heard by the State Court before the end of the April term. It was therefore filed at or before the time at which the defendant was required by the laws of the State to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ.

Was this a compliance with the provision of the Act of Congress of 1887 which defines the time of filing a petition for removal in the State Court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to

be filed at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint." These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to "oppose or answer" the declaration or complaint which the defendant is summoned to meet. Stephen on Pleading, (1st Am. ed.), 60, 62, 63, 70, 71, 239; Lawes on Pleading, 36. The Judiciary Act of September 24, 1789, c. 20, § 12, required a petition for removal of a case from a State Court into the Circuit Court of the United States to be filed by the defendant "at the time of entering his appearance in such State Court." 1 Strat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. Pullman Car Co. v. Speck, 113 U. S. 84; Smith v. Lyon, 133 U. S. 315, 320; In re Pennsylvania Co., 137 U. S. 451, 454; Fisk v. Henarie, 142 U. S. 459, 467; Shaw v. Quincy Mining Co., 145 U. S. 444, 449.

Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the State Court as soon as the defendant was required to make any defense whatever in that court; so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States.

As the petition for the removal of this case into the Circuit Court of the United States was not filed in the State Court within the time mentioned in the Act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the Circuit Court of the United States must have been reversed, with directions to remand the case to the State Court. Edrington v. Jefferson, 111 U. S. 770; Baltimore & Ohio Railroad v. Burns, 124 U. S. 165.[2]

[2] See also Lewis v. Clyde S. S. Co., 131 N. C. 652, 653, 654, 42 S. E. 969, 969 (1902).

But compare Mahoney v. New South Building & Loan Ass'n, 70 Fed. 513 (1895); Duncan v. Associated Press, 81 Fed. 417, 422 (1897); Wilson v.

RUBY CANYON GOLD MIN. CO. v. HUNTER.

Circuit Court, W. D. South Dakota. 1894.

60 Fed. 305.

Sanborn, Circuit Judge.—Motions to remand these cases are made because, while the petitions and bonds for removal were filed in a State Court within the time fixed by stipulations of the parties and orders of the court extending the time beyond that fixed by statute for the defendants to answer (as the parties and the court might lawfully do under the statutes of South Dakota), they were not filed within the 30 days within which the defendants were required by those statutes to answer or plead to the complaints in the absence of such stipulations or orders. Cop. St. S. D. §§ 4908, 4939.

The provision of section 3 of the Act of March 3, 1887, as corrected by the Act of August 13, 1888 (25 Stat. 433 Supp. Rev. St. p. 613, § 3), which requires the petition for removal to be filed in the State Court "at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," is imperative, and requires the petition to be filed within the time fixed by the statute (where the statute fixes it), or within the time fixed by the rule of court (where the rule of court fixes it), and not within any time that a defendant may obtain by stipulation with the plaintiff, or by order of court. This construction secures uniformity in the practice, prevents delays, and I think is in accord with the evident intention of Congress. It was not within any time that a defendant might procure to be given him by the court of his opponent, but within the time fixed by the statute, that Congress intended the petition should be filed. Spangler v. Railroad Co., 42 Fed. 305; Velie v. Indemnity Co., 40 Fed. 545; Austin v. Gagan, 39 Fed. 626; Dixon v. Telegraph Co., 38 Fed. 377; Hurd v. Gere, Id. 537; Delbanco v. Singletary, 40 Fed. 177; Rock Island Nat. Bank v. J. S. Keator

Winchester & P. R. Co., 82 Fed. 15, 15-17 (1897); Groton Bridge & Mfg. Co. v. American Bridge Co., 137 Fed. 284, 293-296 (1905).

As to the effect of treating a petition as filed, though it has not been, see Bryan v. Barriger, 251 Fed. 328, 329-330.

To the effect that the time for answering expires when the answer is filed, see Howard v. Southern Ry. Co., 122 N. C. 944, 947, 29 S. E. 778, 779 (1898).

See in this relation, as to effect of preliminary proceedings. Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381, 391-395 (1902).—Ed.

Lumber Co., 52 Fed. 897; Railroad Co. v. Daughtry, 138 U. S. 298, 303, 11 Sup. Ct. 306. The petitions for removal in this case were not filed before the defendants were required by the laws of South Dakota to answer or plead to the complaint. They were too late.

The motions to remand must be granted.[1]

CHIATOVICH v. HANCHETT.

Circuit Court, D. Nevada. 1897.

78 Fed. 193.

HAWLEY, District Judge (orally).[2]—This is an action of libel, and was brought in the District of Esmeralda County, Nev. The complaint was filed August 29, 1896. Summons was served on L. E. Hanchett August 31, 1896. On September 5, 1896, the district judge, for good cause shown, extended the time "to plead in the above-entitled action" to September 30, 1896. On September 26, 1896, Messrs. Torreyson & Summerfield entered their appearance in said action on behalf of the defendant L. J. Hanchett, and accepted "the time specified in the stipulation herein on file in which to plead to the complaint in said action." The terms of the stipulation referred to were "that the above-named defendants L. J. Hanchett and L. E. Hanchett shall have to and including the 15th day of October, 1896, in which to plead to plaintiff's complaint in the above-entitled action." On October 14, 1896, the defendants, by their attorneys, appeared in the District Court solely for the purpose of applying to the court for an order removing the cause to the Circuit Court of the United States. The petition for

1 See further, in accord, Martin v. Carter, 48 Fed. 596, 598 (1896); Pilgrim v. Aetna Life Ins. Co., 234 Fed. 958 (1916).

Compare Dwyer v. Peshall, 32 Fed. 497 (1887); Hurd v. Gere, 38 Fed. 537 (1889); Fox v. Southern Ry. Co., 80 Fed. 945 (1897); Solomon v. Pennsylvania R. Co., 240 Fed. 231 (1917).

Where the service of summons on the non-resident defendant is void, the time limited by the state statute for the defendant to appear and plead does not begin to run from the date of such service, as far as the time within which a removal must be requested is concerned. Tortat v. Hardin Min. & Mfg. Co., 111 Fed. 426, 429 (1901).

As to the effect of an entire lack of service, see Robert v. Pineland Club, 139 Fed. 1001, 1002-1003 (1905); Williams v. Wilson Fruit Co., 222 Fed. 467 (1915); Dunbar v. Rosenbloom, 230 Mass. 176, 179, 119 N. E. 829, 830 (1918).—Ed.

2 Only a portion of the opinion is reprinted.—Ed.

removal was made upon the ground that the plaintiff was at the time of the commencement of the action, and still is, a citizen and resident of the State of Nevada, and that the defendants were at that time, and still are citizens and residents of the State of California. The District Court, upon the facts set out in the petition, the giving of a proper bond, etc.. made an order removing said cause to this court.

The preliminary objections being disposed of, we now reach the merits of the motion to remand. Was the petition for removal filed in time? The statute provides that, whenever any party is entitled to remove any suit "from a State Court to the Circuit Court of the United States he may make and file in such suit in such State Court at the time or any time before the defendant is required by the laws of the State or the rule of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff." It is the settled law and practice of the United States courts that an extension of time to answer by order of court, whether made on stipulation or not, extends the time for removal. Rycroft v. Green, 49 Fed. 177; Phenix Ins. Co. v. Charleston Bridge Co., 13 C. C. A. 58, 65 Fed. 628; Price v. Railroad Co., 65 Fed. 825; Garrard v. Silver Peak Mines, 76 Fed. 1 and authorities there cited. This point is conceded by the plaintiff; but his contention is that a mere stipulation of counsel, without any order of the court, is insufficient to extend the time for a removal, and cites authorities in support of this proposition. Martin v. Carter, 48 Fed. 596; Schipper v. Cordage Co., 72 Fed. 803. But the question depends solely upon what "is required by the laws of the State or the rule of the State Court in which such suit is brought." This court must be governed in its decision upon this point by the laws and rules of the Court of the State of Nevada. By the laws of this State the Supreme Court is authorized to "make rules not inconsistent with the Constitution and laws of the State for its own government and the government of the District courts." Gen. St. Nev. § 3612. In pursuance of that authority of the District courts, among others that no agreement or stipulation of counsel should be regarded "unless the same shall be entered in the minutes in the form of an order by consent or unless the same shall be in writing subscribed by the party against whom the same shall be alleged or by his attorney or counsel." Rule 27, 20 Nev. 28, and 24 Pac. xi. In Haley v. Bank, 20 Nev. 410, 22 Pac. 1098, the court held that such rules were intended to be supplemental to the provisions of the statute as rules for the

government of all proceedings in the District Court, and that they should have the same force and effect as if they were incorporated in the statutory provisions of the State. No default could have been entered in the State Court. The time for defendants to plead had not expired. The petition for removal was filed in time. People's Bank v. Aetna Ins. Co., 53 Fed. 161.[3]

MR. CHIEF JUSTICE FULLER, in Kansas City Railroad v. Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. Ed. 963 (1891) said,

"The statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal."

POWERS v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

Supreme Court of the United States. 1898.

169 U. S. 92, 18 S. Ct. 264, 42 L. Ed. 673.

Powers sued the defendant railway company, as well as Boyer, Evans and Hickey, the conductor, engineer and fireman of a railway train of the company, for injuries done to Powers by them. The railway company, before its answer was required to be filed, obtained a removal of the case into the Federal District Court. It was remanded to the State Court, there being no separable controversy between Powers and the company, who were citizens of different States, since the other defendants were citizens of the same State as Powers. After the time within which the de-

[3] As to the effect of stipulations and court orders to extend the time within which a removal may be had, see, in accord, Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co., 60 Fed. 929, 930-932 (1894); Citizens' Trust & Savings Bank v. Hobbs, 253 Fed. 479 (1918).

Compare Tracy v. Morel, 88 Fed. 801, 802 (1898).—Ed.

fendants were required to answer, Powers dropped all the parties as defendants except the railway company. The railway company immediately thereafter asked for a removal from the State to the Federal Court.[1]

Mr. Justice Gray, after stating the case, delivered the opinion of the court. * * * The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. Manchester, etc., Railway v. Swan, 111 U. S. 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, "but modal and formal," and a failure to comply with it may be the subject of waiver or estoppel. Ayers v. Watson, 113 U. S. 594, 597-599; Northern Pacific Railroad v. Austin, 135 U. S. 315, 318; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 688-691; Connell v. Smiley, 156 U. S. 335.

Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts. Edrington v. Jefferson, 111 U. S. 770; Baltimore & Ohio Railroad v. Burns, 124 U. S. 165; Kansas City, etc., Railroad v. Daughtry, 138 U. S. 298; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 686, 687.

But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all.

In Northern Pacific Railroad v. Austin, 135 U. S. 315, where a plaintiff suing in an inferior court of a State had laid his damages at less than the sum necessary to authorize a removal into the Circuit Court of the United States and was permitted at the trial to increase the *ad damnum* above that sum, and judgment of the District Court was affirmed by the highest court of the State, a writ of error to that court was dismissed by this court solely because no application for removal had been made after the allow-

[1] The facts are restated.—Ed.

ance of the amendment; and the Chief Justice, in delivering the opinion, said: "If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit, as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal, Ayers v. Watson, 113 U. S. 594, 598, it may, though obligatory to a certain extent, be waived; and as where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him." 135 U. S. 318.

The question whether a defendant may file, in the State Court in which the suit was commenced, a petition for removal, after the time mentioned in the Act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

In order to warrant a removal from a court of a State into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States, must exist. It is only when that does exist, that "any party entitled to remove any suit" "may make and file a petition in such suit in such State Court at the time, or at any time before the defendant is required by the laws of the State, or the rule of the State Court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending," and to give bond to file a copy of the record in that court "on the first day of its then next session." Act of March 3, 1887, c. 373, as corrected by Act of August 13, 1888, c. 866; 25 Stat. 435.

This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the Act of Congress, that "any party entitled to remove any suit," "may make and file a petition for removal"

at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same State as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefore, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*.

The reasonable construction of the Act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal filed immediately upon such discontinuance, was filed in due time.[2]

JONES v. ADAMS EXPRESS CO.

Circuit Court, E. D. Kentucky. 1904.

129 Fed. 618.

Cochran, District Judge.—It is well settled that a party bringing a suit in a Federal Court or seeking to remove one brought

2 Only a portion of the opinion is reprinted.
For another case of this kind, see Speckart v. German Nat. Bank, 85 Fed. 12, 12-15 (1898).—Ed.

in a State Court thereto must show affirmatively in his petition or bill in the one case and in his petition for removal in the other case that the Federal Court has jurisdiction thereof by alleging the facts essential to give it jurisdiction. If he does not show this, his petition or bill in the one case will be dismissed, or the cause in the other case will be remanded to the State Court, and that by the court upon its own motion upon becoming aware of the failure to show jurisdiction. It is also well settled that if the ground of Federal jurisdiction relied on is that of diversity of citizenship, the party suing or removing must allege not simply that the parties are citizens of different States, but the States of which they are citizens. In the case of Cameron v. Hodges, 127 U. S. 325, 8 Sup. Ct. 1155, 32 L. Ed. 132, Mr. Justice MILLER said:

"This court has always been particular in requiring a distinct statement of the citizenship of the parties and of the particular State in which it is claimed, in order to sustain the jurisdiction."

In the case of Benjamin v. City of New Orleans, 74 Fed. 417, 20 C. C. A. 591, it was held that a bill filed in the United States Circuit Court of Louisiana by the assignee of certain claims against the City of New Orleans, which alleged that each of the assignors of said claims were "citizens, respectively, of States other than the State of Louisiana," was properly dismissed because it did not set forth the States of which said assignors were citizens. Judge SPEER said:

"The defendant is entitled to actual and definite notice in the plaintiff's pleading of the citizenship or alleged citizenship of each assignor. No fact in the pleading of the plaintiff in these courts can be more material, for the authority of the court to act depends upon it. It was not sufficient, then, to say that the assignors were 'citizens, respectively, of States other than Louisiana, and competent, as such citizens, to maintain suit in this court.' Jurisdiction cannot be inferentially averred."

The general allegation of diversity of citizenship is not sufficient to give the Federal Court jurisdiction, in the absence of a motion to make it more specific. It is simply sufficient to permit an amendment making it more specific. This was all that was decided in the case of Stadlemann v. White Line T. Co. (C. C.) 92 Fed. 209. If an amendment had not been offered in that case, making the petition for removal specific by alleging the particular State of which the plaintiff in the action was a citizen, the motion

to remand would have been sustained. So far there can be no question as to the correctness of the positions taken.

The question which this case presents is whether the numerousness of the parties plaintiff or defendant makes any difference. It is alleged in the petition for removal that the petitioner and defendants in the action are more than 3,000 in number. The plaintiff had a right to sue them all. Under the decision in the case of Adams Express Co. v. Schofield (Ky.), 64 S. W. 903, 23 Ky. Law Rep. 1120, he had a right to sue them under the name of Adams Express Company, and the cause was not removable unless all of them were citizens of States other than Kentucky. The defendants claim that to compel them to set out the States of which each of them are citizens will be a hardship on them, and a practical denial of the right to come into the Federal Court. Is the fact of the numerousness of the petitioners and the hardship that it will be upon them to require them to make their petition for removal more specific sufficient reason for this court taking jurisdiction of this cause, nothing else appearing than what is alleged in the petition for removal? Two reasons occur to me why, in a case of this kind, it is not sufficient reason. It will simply postpone the hardship to a later stage of the proceeding. It will certainly be imposed upon them by a denial of the general allegation as to the citizenship of the petitioners. The other is that it takes from the petitioners the burden of showing that this court had jurisdiction, and imposes on defendant to the removal the burden of showing that it has not jurisdiction, thereof. Certain advantages accrue to defendants by so many of them being able to do business together without incorporation. If it were not so, they would not transact business in this way. Certain disadvantages grow out of it also. They should take the disadvantages with the advantages—the bitter with the sweet. I think the fair inference from the decisions in the cases of Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800, Great So. F. P. H. Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482, is that the numerousness of parties plaintiff or defendant is not sufficient to take a case out of the well-settled rules heretofore stated.

I think, therefore, that I erred in overruling the motion to remand. The order overruling it will therefore be set aside. The petitioners may file an amendment setting forth the States of

which each of them is a citizen, if they so desire; otherwise the motion to remand will be sustained.[1]

LOOP v. WINTERS' ESTATE.

Circuit Court, D. Nevada. 1902.

115 Fed. 362.

HAWLEY, District Judge (orally)— * * * Counsel say there was no seal affixed to the paper called a bond, and for that reason it was not a legal bond, but admit that the point is purely technical. It has been held that the omission of a seal on a removal bond is a mere formal defect, which can be cured by amendment. The omission of the seal furnishes no sufficient ground to justify the court in remanding the case. The question whether a seal is essential or not depends upon the provisions of the statute. G. V. B. Min. Co. v. First Nat. Bank, 36 C. C. A. 633, 95 Fed. 23, 33. It is not made essential by the statutes of the United States or the statutes of this State. The statutes of the United States do not, in terms, require a seal. Section 3 of the act to regulate removal of causes, approved August 13, 1888, simply requires that petitioners for removal of a cause shall file with their petition "a bond with good and sufficient sureties." 25 Stat. p. 435. * * *

Counsel for plaintiff claims that there was no order for removal made by the State Court. None is necessary. The statute provides that after the filing of a petition and bond "it shall then be the duty of the State Court to accept said petition and bond, and proceed no further in said suit." 25 Stat. 1888, § 3. No statute or rule of practice requires a defendant to give notice to a plaintiff of the filing of a petition for the removal of a cause from a State to a Federal Court.

Chiatovich v. Hanchett (C. C.), 78 Fed. 193, 194, and authorities there cited.

In Noble v. Association (C. C.), 48 Fed. 337, 338, the court said: "Certainly, it is the decorous practice for the moving party to present his petition and bond to the judge of the State Court, and obtain the formal acceptance of the court. It is also the safer

[1] For cases illustrating instances of insufficient allegations of citizenship, see Grand Trunk Ry. Co. v. Twitchell, 59 Fed. 727, 729, 8 C. C. A. 237, 239, 21 U. S. App. 45, 48 (1894); Dinet v. City of Delavan, 117 Fed. 978 (1902); Kansas City Southern Ry. Co. v. Prunty, 133 Fed. 13, 15-16, 66 C. C. A. 163, 165-166 (1904); Grace v. American Central Ins. Co., 109 U. S. 278, 284-285, 3 S. Ct. 207, 211, 27 L. Ed. 932, 935 (1883).

It is sufficient, if the proper jurisdictional facts appear any place in the record of the case. Briges v. Sperry, 95 U. S. 401, 403, 24 L. Ed. 390, 390 (1877).—Ed.

practice, because he can thereby have an opportunity to obviate any remedial objections which are suggested to their sufficiency in case the court refuses to accept them. But this is not indispensable, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient. When filed, they become a part of the record in the cause, and the court is judicially informed that its power over the cause has been suspended."

In Eisenmann v. Mining Co. (C. C.), 87 Fed. 248, this court said:

"The law is now well settled * * * that, when a sufficient cause for removal is made in the State Court, its jurisdiction ends, and no order of the State Court for removal is necessary. In other words, upon the filing of the petition for removal, accompanied by a proper bond,—the suit being removable under the statute,—the jurisdiction of the Federal Court immediately attaches in advance of the filing of the copy of the record; and whether that court should retain jurisdiction is for it, and not for the State Court, to determine."

See, also, Kern v. Huidekoper, 103 U. S. 485, 490, 26 L. Ed. 354; Marshall v. Holmes, 141 U. S. 589, 595, 12 Sup. Ct. 62, 35 L. Ed. 870, and authorities there cited; Lund v. Railroad Co. (C. C.), 78 Fed. 385; I Desty, Fed. Proc. § 110, and authorities there cited; Mecke v. Mineral Co., 35 C. C. A. 151, 93 Fed. 697, 700.[1]

GROTON BRIDGE & MFG. CO. v. AMERICAN BRIDGE CO.

Circuit Court, N. D. New York. 1905.

137 Fed. 284.

RAY, District Judge— * * * The Removal Act, first part of section 3 of the Act of August 13, 1888, c. 866, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), provides:

[1] Only a portion of the case is reprinted.

For other cases dealing with irregularities in bonds which were held not to be fatal, see, Hodge v. Chicago & A. Ry Co., 121 Fed. 48, 49-51, 57 C. C. A. 388, 389-391 (1903) mistake in name of district to which removal should be made; Mutual Life Ins. Co. v. Langley, 145 Fed. 415, 417-419 (1906) bond not accompanied by power of attorney authorizing the agent to sign it; Chase v. Erhart, 198 Fed. 305, 307-308 (1912) wrong time for entering copy of record named; Ellis v. Atlantic & Pacific Railroad, 134 Mass. 338, 341-342 (1883) wrong time for entering copy of record named.

"That whenever any party entitled to remove any suit * * * may desire to remove such suit from a State Court to the Circuit Court of the United States, he may make and file a petition in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

As to the first objection—that the petition and alleged undertaking were never presented to the State Court—it clearly and sufficiently appears that the petition and undertaking were presented to the State Court. The plaintiff admits in his brief, as we have seen, that Judge DICKEY was sitting in chambers when he approved the bond or undertaking; and, as the bond recites that the defendant had petitioned for a removal of the cause to the Circuit Court of the United States, and as the bond was given and its approval sought as a necessary step in such removal, the fair presumption is that both the petition and undertaking were before the judge when he indorsed his approval on the bond. A judge sitting in chambers constitutes a court when doing *ex parte* business certainly, and a presentation of a petition and bond for removal to a judge of the Supreme Court sitting in chambers must

But see Alexandria Nat. Bank v. Willis C. Bates Co., 160 Fed. 839, 841-842 (1908) name of principal misspelled; Missouri K. & T. Ry. Co. v. Chappell, 206 F. 688, 698-699 (1913) wrong time for entering copy of record named, Webb v. Southern Ry. Co., 248 Fed. 618, 620-621, 160 C. C. A. 518, 520-521 (1918) mistake in name of district in whose court the record should be filed; Grow v. Wiman, 3 N. Y. St. Rep. 281, 281-282 (1886) bond made to "the people of the State of New York" instead of to the plaintiff.—Ed.

be sufficient within the intent and meaning of the removal act. Were it otherwise it would be within the power of parties bringing actions in the State Court to defeat removal entirely. It frequently happens that during the month of August the Supreme Court of the State of New York has no regular appointed term or adjourned term of the court running. However, judges may be found in some parts of the State sitting in chambers. Should a suit be brought at such time in the State Court (one removable to the Circuit Court of the United States), and should the defendant be unable to secure an extension of time to answer either by a stipulation or order, can it be possible that the right of removal is lost because the petition and bond has not been presented to the Supreme Court, when in fact presented to a judge of the Supreme Court sitting in chambers, and the bond is approved by such judge, and the petition and bond are then filed in the Supreme Court; that is, with the clerk of the Supreme Court in the county where the venue of the action was laid? All that the Removal Act requires is that the party entitled to remove the cause shall make and file a petition in such suit in such State Court, and make and file therewith a bond with good and sufficient surety conditioned as named. It is not required that the petition be presented to any judge or to a court in session, or that an order be made by the court permitting the filing of the petition or directing the removal. But if the proper construction of the statute is that the petition and bond must first be presented to the court before they are filed in the court, it is clear that they have been presented to the court and in the court when presented to a judge of the court sitting in chambers, for a judge of the Supreme Court sitting in chambers is authorized to grant ex parte orders and transact any business not requiring notice to the other party. No notice to the other party is required in these removal proceedings. And it is settled that "the presenting of the petition to a judge in chambers and the filing of it in the State Court satisfies the statute." Remington v. Central Pac. R. Co. (U. S. S. C., not yet reported, but decided April 17, 1905, No. 460) 25 Sup. Ct. 577, 49 L. Ed. —; Noble v. M. B. Ass'n (C. C.), 48 Fed. 337; Loop v. Winter's Est. (C. C.), 115 Fed. 362. If the petition filed makes a proper case, and the bond is sufficient and in accordance with the statute the cause is removed from the State Court to the Circuit Court of the United States when such petition and bond are filed in the State Court, even if that court makes an order refusing the application for removal. In that case Mrs. Marshall filed a petition

accompanied by a proper bond for the removal of her suit from the State Court into the Circuit Court of the United States upon the grounds that she was a citizen of New York and the defendants, respectively, were citizens of Mississippi and Louisiana, and that the controversy was wholly between citizens of different States, and that it could be fully tried and determined between them. The State Court made an order refusing the application for removal. The Supreme Court of the United States held and decided:

"Upon the filing of a proper petition and bond for the removal of a cause pending in a State Court, such cause, if removable under the Act of Congress, is, in law, removed so as to be docketed in the Circuit Court of the United States, notwithstanding the State Court may refuse to recognize the right of removal."

In the opinion, Justice HARLAN, speaking for the court, said:

"After the filing of the petition for removal accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different States, the State Court was without authority to proceed further if the suit, in its nature, is one of which the Circuit Court of the United States could rightfully take jurisdiction. If, under the Act of Congress, the cause was removable, then, upon the filing of the above petition and bond, it was in law removed so as to be docketed in that court, notwithstanding the order of the State Court refusing to recognize the right of removal."

It is not questioned that on the approval of the bond by a judge of the State Court sitting in chambers both the petition and bond were filed with the clerk of the court; that is, with the county clerk of the County of Tompkins, N. Y., who, by the Constitution of the State of New York (article 6, § 19), is made the clerk of the Supreme Court in the County of Tompkins. The filing of these papers with the clerk of the court was clearly a filing in and with the court. To hold otherwise would be to hold that papers cannot be filed in the Supreme Court only when the Supreme Court is in session in the county where the filing is required to be made. In Tompkins County a term of the Supreme Court is held but three or four times in the course of a year and these sessions last from two to three weeks, so that at least eight months in the year the Supreme Court is not in session in Tompkins County, and hence, under the construction of the statute claimed by the plaintiff, it would be impossible to make and file a petition in a removable cause in the State Court, venue laid in the County of Tomp-

kins, for about eight months in the year. In this case the bond and petition were filed December 30, 1904, and on the 5th day of January, 1905, a copy of the record on removal, including such petition and bond, was served on the plaintiff's attorneys, and the record on removal so shows. See, on this subject, Fisk v. Union Pacific R. Co., 9 Fed. Cas. 149, 6 Blatchf. 362. These cases were under a prior statute, but the statute was substantially that of the act as it now reads. See also Removal Cases, 100 U. S. 457, 25 L. Ed. 593; U. S. Supreme Court Practice, May, page 203.

Of course, a bond or undertaking should be presented to a judge of the Supreme Court, and approval of the sufficiency of the surety obtained. But should the court arbitrarily refuse to approve a surety, it cannot be doubted that the removing party would have the right to file the bond and petition, procure the filing of the record on removal, and proceed in the Circuit Court of the United States. The remedy of the plaintiff in such a case would be to move to remand and show the insufficiency of the surety, and that the judge of the State Court was justified in refusing to approve the bond. * * *

The second and third grounds of the motion to remand will be considered together. They relate to the sufficiency of the bond filed. This bond says: "Know all men by these presents, that the American Bonding Company of Baltimore (describing its office and place of business in the City of New York, N. Y.), is held and firmly bound unto Groton Bridge & Manufacturing Company in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Groton Bridge and Manufacturing Company, its representatives and assigns, it binds itself, its representatives, successors and assigns, firmly by these presents." Then follow the conditions before given. Then, "In witness whereof," etc., the signature and attestation, and all the other formalities required. This is clearly a bond, but it is not signed by the defendant, and the liability of the bonding company is limited to $500. These are the objections presented. The Removal Act does not in terms require that the bond be signed by the removing party. He is to make and file with the petition a bond with good and sufficient surety. It was held that it is unnecessary for the removing party to sign the bond under section 3 of the Act of 1875, 18 Stat. 471, c. 137. Stevens v. Richardson (C. C.), 9 Fed. 191; P. G. & S. Exc. v. W. U. Tel. Co. (C. C.), 16 Fed. 289; People's Bank of G. v. Aetna L. Ins. Co. (C. C.), 53 Fed. 161. In Stevens v. Richardson, *supra*, BLATCHFORD, J., said:

"The plaintiff contends that, as section 3 of the Act of 1875 says that the petitioner for removal is to 'make and file' the bond, the bond is void and the removal invalid. This objection is not tenable. The statute is satisfied, as to the bond, if a bond with sufficient surety is filed. The petitioner for removal makes the bond, in the sense of the statute, if he offers it to the court as the bond required. By section 639 of the Revised Statutes he was required to offer good and sufficient surety. The Act of 1875 means no more.

The other cases cited, one in the Northern District of Illinois and the other in the District of South Carolina, hold the same.

The objection that the bond names a penal sum is equally untenable. It is true that the statute says nothing of a penal sum, but that the bond is to be "for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." It has been held more than once that it is proper to insert a penal sum in the bond, and the forms prescribed by writers are uniform in inserting a penal sum. Com. of Kentucky v. Louisville Bridge Co. (C. C.), 42 Fed. 242; Johnson v. F. C. Austin Mfg. Co. (C. C.), 76 Fed. 616; Fosters Fed. Practice (3d Ed.) p. 931, § 385b; Desty's Federal Proc. (Tebbs, 1899) p. 808; Field, Fed. Courts, 767; Bump's Fed. Proc. 909; Hughes' Fed. Proc. 332. Foster says, "The bond should name a specific sum as the penalty." Clearly, this bond will cover all costs and damages that, in any event, can be awarded. The record on removal has been filed and in this case no special bail is required. The bond was accepted by the State Court, and this court deems it ample.

In Commonwealth of Kentucky v. Louisville Bridge Co., *supra,* the court said, page 242:

"The bonds which were executed by the defendants and accepted by the State Court are each in the penalty of $500, and are in conformity with the provisions of the statute in every respect, unless a penalty is improper. It is claimed that the third section of the Act of March 3, 1875 (18 Stat. 471, c. 137) as amended by the Act of March 3, 1887 (24 Stat. 552, c. 373), provides for a bond unlimited in extent, and one not to be limited by a fixed penalty, and therefore these bonds are fatally defective, and, as

the execution of a proper bond is jurisdictional, this case should be remanded for that reason. Whether the execution of a valid and proper bond under this act and the Act of March 3, 1875, is jurisdictional, has been much discussed; and the Circuit Courts have differed in opinion. See Burdick v. Hale, 7 Bliss. 96, Fed. Cas. No. 2,147; Torrey v. Locomotive Works, 14 Blatchf. 269, Fed. Cas. No. 14,105; Deford v. Mehaffy (C. C.), 13 Fed. 481; Harris v. Railroad Co. (C. C.), 18 Fed. 833. But that question does not arise in this case, as I think the bonds which were executed by defendants, and accepted by the State Court, are valid bonds to the extent of the penalty, and the penalties are sufficient to cover the cost likely to accrue in this case. It may be that a bond without a penalty would be good under the statute; but the act does not prohibit a bond with a penalty, although it does prescribe the obligations under which the obligor must come. I therefore think the State Court properly accepted these bonds with a penalty, as the obligations conformed to the provisions of the act. Both Field and Bump give forms of removal bonds with a penalty. See Field, Fed. Courts, 767; Bump, Fed. Proc. 909."

In Hughes' Fed. Proc. p. 332, the author says:

"It will be observed that the statute does not name any fixed amount as a penalty. There is some difference of opinion among the courts whether a bond should name a penalty or not. It would seem to be the correct practice to name a penalty, but the penalty named should be sufficiently large to cover all possible costs in the event of a remand; and if it is, the better opinion is that the bond would be in proper form."[1]

TEXARKANA TELEPHONE CO. v. BRIDGES.

Supreme Court of Arkansas. 1905.

75 Ark. 116, 86 S. W. 841.

In this action two defendants were alleged in the complaint to be foreign corporations, but the complaint contained no allegation

[1] Only a portion of the opinion is reprinted.

The mere filing of the petition and bond in the office of the clerk of the state court is insufficient. Fox v. Southern Ry. Co., 80 Fed. 945, 948 (1897).

As to the effect of an oral motion for the removal of a cause, see Mays v. Newlin, 143 Fed. 575, 577 (1906).

A bond which merely leaves a blank space instead of naming a penal sum

as to whether the street railway company which was joined as a defendant was a corporation. The two defendants described as foreign corporations filed a petition and bond for removal to the Federal Court, stating that the street railway company was not a corporation, but a trade-name under which one of two individuals was doing business, and that neither of such persons had been served with process or were parties to the suit.

MCCULLOCH, J. (after stating the facts).—The right of removal of a cause from a State to the Federal Court, so far as concerns the action of the State Court, depends upon and must be determined by the condition of the record in the State Court at the time the removal is sought (Chesapeake & Ohio Railway Company v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121); and, where the alleged ground for removal is the diverse citizenship of the parties, the allegations of the petition alone can be looked to by the State Court, in determining the right of removal. The State Court has no jurisdiction to try an issue of fact raised on the petition for removal. This can only be done by the Federal Court on motion to remand after removal. L. R. M. R. & T. Ry. Co. v. Iredell, 50 Ark. 388, 8 S. W. 21; Moon on Removal of Causes, p. 498; Burlington Railway Co. v. Dunn, 122 U. S. 514, 7 Sup. Ct. 1262, 30 L. Ed. 1159; Kansas City, Ft. S. & M. Ry. Co. v. Daughtry, 138 U. S. 306, 11 Sup. Ct. 306, 34 L. Ed. 963; Southern Ry. Co. v. Hudgins, 107 Ga. 334, 33 S. E. 442, Stix v. Keith, 90 Ala. 121, 7 South 423; Craven v. Turner, 82 Me. 383, 19 Atl. 864. Chief Justice WAITE, speaking for the Supreme Court of the United States in the case of Burlington v. Dunn, *supra*, concisely defines the rule of practice with reference to removal of causes as follows: "The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and necessary security furnished. It presents then to the State Court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the

is insufficient. Burdick v. Hale, 4 Fed. Cas. No. 2,147, p. 721, 7 Bissell 96 (1876).

See further, as to contents of bond, Hayes v. Todd, 34 Fla. 233, 238, 15 So. 752, 754 (1894); Cooke v. Seligman, 7 Fed. 263, 269 (1880); Harrold v. Arrington, 64 Tex. 233, 235-237 (1885); C. C. C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474, 484, 30 N. E. 869, 871 (1892).

A bond not signed by the principal is insufficient. Rough v. Booth, 3 Pac. 91 (1884).—Ed.

petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit." The only question, then, which we have to determine is whether the record upon the filing of the petition showed a right of removal by appellants, two foreign corporations. There is no allegation in the complaint that the other defendant named, the Texarkana Street Railway Company, is a corporation, either domestic or foreign. The petition for removal states that the railway company is not a corporation, but is a trade-name under which either Bamboff or Crouch is doing business and that neither of those persons have been served with process or are parties to the suit. According to these allegations, the two appellants were the only defendants to the action, and were therefore entitled to have the cause removed. Upon this showing made by the petition the Federal statute made it the duty of the Circuit Court "to accept said petition and bond and proceed no further in the suit." All further proceedings in that court were without jurisdiction, erroneous, and void.[1]

GIBSON v. MISSISSIPPI.

Supreme Court of the United States. 1896.

162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

The first question presented for our consideration relates to the application of the accused for the removal of the prosecution from the State Court into the Circuit Court of the United States.

By section 641 of the Revised Statutes it is provided:

"When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunal of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, * * * such suit or prosecution may, upon the petition of such defendant, filed in said

[1] The facts are restated, and a portion of the opinion is omitted.

As to the effect of merely filing the petition, see Colorado Fuel & Iron Co. v. Four Mile Ry. Co., 29 Colo. 90, 93, 66 Pac. 902, 903 (1901).—Ed.

State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State Court shall cease," etc.

In Neal v. Delaware, 103 U. S. 370, 386, reference was made to the previous cases of Strauder v. West Virginia, Virginia v. Rives and Ex parte Virginia, 100 U. S. 303, 313, 339, and to sections 641 and 1977 of the Revised Statutes; also to the Act of March 1, 1875, c. 114, 18 Stat. 335, which, among other things, declared that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude." The cases cited were held to have decided that the statutory enactments referred to were constitutional exertions of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that while a State, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be discrimination against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which were excluded, because of their color, men of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be

the exclusion from juries, in States where the blacks have the majority, of the white race because of their color.

But those cases were held to have also decided that the Fourteenth Amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgment whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States rights secured by law providing for the equal civil rights of citizens of the United States, to which secton 641 refers, and on account of which a criminal prosecution may be removed from a State Court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the constitution or laws of the State, rather than a denial first made manifest at or during the trial of the case.

We therefore held in Neal v. Delaware that Congress had not authorized a removal of the prosecution from the State Court where jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the State, excluded colored citizens from juries because of their race.

In view of their decision, it is clear that the accused in the present case was not entitled to have the case removed into the Circuit Court of the United States unless he was denied by the constitution or laws of Mississippi some of the fundamental rights of life or liberty that were guaranteed to other citizens resident in that State. The equal protection of the laws is a right now secured to every person without regard to race, color or previous condition of servitude; and the denial of such protection by any State is forbidden by the supreme law of the land. These principles are earnestly invoked by counsel for the accused. But they do not support the application for the removal of this case from the State Court in which the indictment was found, for the reason that neither the constitution of Mississippi nor the statutes of that State prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable to all citizens of

the United States and to all persons within the jurisdiction of the State without regard to race, color or previous condition of servitude. Nor would we be justified in saying that the constitution and laws of the State had, at the time this prosecution was instituted, been so interpreted by the Supreme Court of Mississippi as to show, in advance of a trial, that persons of the race to which the defendant belongs could not enforce in the judicial tribunals of the State the rights belonging to them in common with their fellow-citizens of the white race. If such had been the case, it might well be held that the denial of the equal protection of the laws arose primarily from the constitution and laws of the State. But when the constitution and laws of a State, as interpreted by its highest judicial tribunal, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of a particular case the State Court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into the Circuit Court of the United States in advance of a trial. * * *

In his petition for the removal of the prosecution into the Circuit Court of the United States the defendant also states that, notwithstanding at the time of selecting the grand jurors for the said December term, 1892, there were in the five supervisors' districts of the County of Washington 7,000 colored citizens competent for jury service and 1,500 whites qualified to serve as jurors, there had not been for a number of years any colored man summoned on the grand jury in that county; and that colored citizens were purposely, on account of their color, excluded from jury service by the officers of the law charged with the selection of jurors. It is clear, in view of what has already been said, that these facts, even if they had been proved and accepted, do not show that the rights of the accused were denied by the constitution and laws of the State, and therefore did not authorize the removal of the prosecution from the State Court. If it were competent, in a prosecution of a citizen of African descent, to prove that the officers in charge with the duty of selecting grand jurors had, in previous years and in other cases, excluded citizens of that race, because of their race, from service on grand juries—upon which question we need not express an opinion—it is clear that such evidence would be for the consideration of the trial court upon a motion by the accused to quash the indictment, such motion being based upon the ground that the indictment against him had been

returned by a grand jury from which were purposely excluded, because of their color, all citizens of the race to which he belonged. United States v. Gale, 109 U. S. 65, 69. But there was no motion to quash the indictment. The application was to remove the prosecution from the State Court, and a removal, as we have seen, could not be ordered upon the ground simply that citizens of African descent had been improperly excluded, because of their race, and without the sanction of the constitution and laws of the State, from service on previous grand juries, or from service on the particular grand jury that returned the indictment against the accused.[1]

JONES v. FOSTER.

Supreme Court of Wisconsin. 1884.

61 Wis. 25, 20 N. W. 785.

CASSODAY, J.—Two trials of the cause having been had prior to the application for removal, it was manifestly not made "before or at the term at which said cause could" have been "first tried," within the meaning of the third section of chapter 137, March 3, 1875 (1 Supp. Rev. St. U. S. 174). This is conceded by counsel for the appellant. It is claimed, however, that the application was not too late to remove the cause under the second and third subdivisions of section 639, U. S. Rev. St. 114. This court has recently held that the second subdivision of that section, which authorized a removal merely on the ground of citizenship, was, in effect, superseded and repealed by the Act of March 3, 1875. Eldred v. Becker, 18 N. W. Rep. 642. See, also, Ct. Rep. 312; Holland v. Chambers, 3 Sup. Ct. Rep. 427. * * *

Was the petition here "filed at any time before the trial or final hearing of the suit," within the meaning of subdivision 3, § 639,

[1] Only a portion of the opinion is reprinted.

For other cases dealing with the question as to whether or not the petitioner has been deprived of his equal rights, see Texas v. Gaines, 23 Fed. Cas. No. 13,847, p. 869, 2 Woods, 342 (1874); State of Alabama v. Wolffe, 18 Fed. 836, 838-841 (1883); State of California v. Chue Fan, 42 Fed. 865 (1890); Scott v. R. D. Kinney & Co., 137 Fed. 1009 (1905); State of New Jersey v. Corrigan, 139 Fed. 758 (1905); Commonwealth of Kentucky v. Wendling, 182 Fed. 140; Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633 (1906).—Ed.

U. S. Rev. St.? Counsel for the appellant claim that it was, and, in support of his contention, cites Ins. Co. v. Dunn, 19 Wall. 214; Whitehouse v. Ins. Co., 2 Fed. Rep. 498; Bible Society v. Grove, 101 U. S. 610; Stone v. Sargent, 129 Mass. 511. Ins. Co. v. Dunn, *supra,* was not under that subdivision, nor under the Act of 1866, where the language was, "at any time before the trial or final hearing of the cause," but was under the Act of 1867, where the language was, "at any time before the final hearing or trial of the suit." It was there held that the word "final" not only qualified the word "hearing," immediately following it, but also the word "trial" connected with it by the disjunctive "or." It is there said that "if the difference in the Act of 1867 be material, it is fair to presume that the change was deliberately made to obviate doubts that might possibly have arisen under the former act, and to make the latter more comprehensive."

When the language of the Act of 1867 was, by the revision of 1873-74, changed back to substantially what it was in the Act of 1866, the difference was equally material, and the change equally deliberate. Bible Society v. Grove, *supra,* had been tried three times before the Act of March 3, 1875, was passed and once afterwards. The real questions determined were that no removal could be made except upon the petition of a citizen of some other State than the one in which the suit was brought, and that a trial and disagreement of the jury after the passage of the act precluded any removal thereafter. The question here presented was not involved. True, the opinion states, that "the Act of March 3, 1875, has not changed this provision (subd. 3, § 639, U. S. Rev. St.) of the Revised Statutes. Removals for this cause (prejudice or local influence) still depend on that section (subdivision), which is a reproduction of the Act of 1867,"—meaning, as we apprehend, a reproduction of the part relating to prejudice or local influence, and not the part relating to the time of making the application, which is, in substance, a reproduction of the Act of July 27, 1866. In Stone v. Sargent, *supra,* the case had been referred to an auditor, who had made and returned his report, and the same was upon the trial list, but had not been tried when the application was made; and it was simply held that the hearing before the auditor was "not a trial" within the meaning of subdivision 3, § 639, U. S. Rev. St., and hence that the application was in time. The same case held that the right given by that subdivision to remove the cause, on the ground of prejudice or local

influence, had not been taken away by the Act of March 3, 1875. To the same effect, Whitehouse v. Ins. Co., *supra.*

These cases in which the petition was filed before any trial had been had have no application to this case, where two trials had already been had before the petition was filed. "Hearing applies to suits in chancery, and trials to action at law." Vannevar v. Bryant, 21 Wall. 43. The words, "at any time before the trial or final hearing of the suit," simply mean, "before the trial" in an action at law, and before the "final hearing" in a suit in equity. The words "final hearing," refer to the hearing in equity upon the merits of the cause, in contradistinction to a hearing upon a matter merely preliminary or interlocutory. Had it been the intention of Congress to qualify the word "trial" by the word "final," as in the Act of 1867, they would have used the language of that Act in the Revision, instead of the language employed in the Act of 1866, or else they would have preceded the word "trial" by word "final." Having, to use a word employed by Mr. Justice Swayne in Ins. Co. v. Dunn, *supra,* "deliberately" taken the word "final" from its place before the disjunctive, and placed it after the disjunctive, we must agree with him that it was just as "material" as the former change the other way.

We are not cited to any case where the precise point has been decided by the Supreme Court of the United States, and we find none. We fully agree with Judge Dyer, that the change in the sections referred to was clearly intended to abridge the time within which suits could be removed from the State to the Federal Court. Phoenix Ins. Co. v. Walrath, 16 Fed. Rep. 163. That case was commenced after the Act of 1875, and hence the learned judge said: "The statutory requirement is imperative that the removal must be made before there is any trial of the suit in the State Court." To the same effect was the opinion of Judge Blatchford in Hendeeker v. Rosenbaum, 6 Fed. Rep. 97. See King v. Cornell, *supra.* There are doubtless cases where removals have been made after one or more trials, but we think it will be found on examination that they were cases in which such trials were had prior to the passage of the Act of 1875, and hence were specially provided for therein. In the absence of any adjudication upon the precise question by the Supreme Court of the United States, we must hold upon reason, as well as authorities cited, that the words "at any time before the trial," found in subdivision 3, § 639, U. S. Rev. St. mean before any trial of the cause in the State Court. It is on this ground, as we understand, that the learned judge

of the Western District of Wisconsin remanded this cause to the State Court.

The order of the Circuit Court is affirmed.[1]

COMMONWEALTH OF VIRGINIA v. BINGHAM.

Circuit Court, W. D. Virginia. 1898.

88 Fed. 561.

PAUL, District Judge.—This case was removed from a court held by a justice of the peace of Franklin County, Va., into this court, on the petition of the defendants. The petition was filed under the provisions of section 643 of the Revised Statutes of the United States, which provides as follows:

"Sec. 643. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or any such law, or on account of any right, title, or authority claimed by such officer or other person under such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court, and in the following manner. Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counsellor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or, if it be not, to the clerk thereof at his office, and shall be filed in said office. The

[1] Only a portion of the opinion is reprinted.

The statute dealt with was not similar to section 31 in many ways, but the time within which a removal could be had was the same as under section 31. Compare Field v. Williams, 24 Fed. 513 (1885) and Brayley v. Hedges, 53 Iowa 582, 583-584 (1880).—Ed.

cause shall thereupon be entered upon the docket of the Circuit Court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State Court. When the suit is commenced in the State Court by summons, subpoena, petition, or any other process except capias, the clerk of the Circuit Court shall issue a writ of certiorari to the State Court requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State Court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State Court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State Court shall be void. * * * "

The petition for removal alleges, in substance, that one Thomas Felts was an officer of the United States, to wit, a deputy collector of internal revenue in the Sixth District of Virginia; that petitioners were acting as part of a posse under the control of the said Felts; and that, while said Felts was in the actual discharge of his official duties, he and the petitioners were attacked and fired upon from ambush by persons supposed to be in sympathy with, and who were defending violators of the internal revenue laws; that petitioners returned the fire in self-defense; that, during the firing, the petitioner Fitzwater was wounded, and the horses of petitioners were shot several times; that during the firing several hundred shots were exchanged; that there were some cattle in the vicinity of the firing; and that, while petitioners have no knowledge that any injury was done to said cattle by the promiscuous firing which took place, "one R. D. Allen has made complaint and information on oath before Samuel Via, a justice of the peace of Franklin County, Virginia, charging them with cruelty to animals, under the statute of Virginia, and further charging that said cattle had been shot by petitioners, and have died."

Following is the warrant issued by said Samuel Via, justice of the peace of Franklin County, Va., on said complaint and information, on oath of said R. D. Allen:

"Commonwealth of Virginia, Franklin County, to wit:

"To G. C. McAlexander, Constable of said County:

"Whereas, R. D. Allen, of said county, has this day made complaint and information on oath before me, Samuel Via, a justice of the peace of said county, that Thomas Bingham and Geo. S. Fitzwater, on the 18th day of July, 1896, in the said county, did unlawfully, but not feloniously, injure, maim, and disfigure two cows, by shooting and killing of them, the property of the said R. D. Allen, against the peace and dignity of the commonwealth of Virigina: These are, therefore, in the name of the commonwealth, to command you forthwith to apprehend and bring before me, or some other justice of the said county, the bodies of the said Thomas Bingham and Geo. S. Fitzwater, to answer the said complaint, and to be further dealt with according to law.

"Given under my hand and seal, this the 18th day of July, 1896.

"Samuel Via, J. P."

The petitioners further allege that they have been arrested under the said warrant, and are held under bail, to answer the same before a justice of the peace of said Franklin County. They further allege that the prosecution aforesaid against them was begun for an act done while they were under the command of said Felts, who was acting under color of his office of deputy collector, and they pray that the prosecution against them may be removed into this court. On the filing of this petition with the clerk of the Circuit Court, the clerk issued a writ of habeas corpus *cum causa,* directed to the justice of the peace who had issued the warrant of arrest for the petitioners; and the justice, in obedience to said writ, stopped all further proceedings in the case, and forwarded the original papers in the case to the clerk of this court, and the case was docketed here. The commonwealth of Virginia moves to remand the case to the justice of Franklin County, Va., before whom it was pending when the petition was filed, on the following grounds:

First. That section 643 of the Revised Statutes of the United States, providing for the removal of prosecutions from a State Court into the Circuit Court of the United States, contemplates only prosecutions pending in a court of record; that this is shown by the following provisions of the statute:

"When the suit is commenced in the State Court by summons, subpoena, petition, or any other process except capias, the clerk

of the Circuit Court shall issue a writ of certiorari to the State Court requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus *cum causa,* a duplicate of which shall be delivered to the clerk of the State Court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State Court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State Court shall be void."

It is insisted that, as a court held by a justice of the peace in Virginia has no clerk, and is not a court of record, a prosecution such as this, which is a misdemeanor under the laws of Virginia, cannot be removed into this court. It is also urged that a proceeding is not "commenced," as the statute (section 643) contemplates, until an indictment has been found by a grand jury in the State Court. It is urged that not only was there no indictment found in the State Court at the time of the filing of the petition in this case, but that no indictment could be found in the courts of the State of Virginia on a charge such as is made by the warrant issued by the justice of the peace.

The act of the Legislature of Virginia, abolishing indictment by a grand jury in cases of misdemeanor, such as is charged in this case, provides that:

"The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have exclusive original jurisdiction of all misdemeanor cases occurring within their jurisdiction, in all of which cases the punishment may be the same as the county or corporation courts are authorized to impose. * * *"

Prior to the passage of this act, misdemeanors (to which class of offenses the offense in the warrant issued by the justice in this case belongs) were indictable by a grand jury. The statute quoted changed the law of Virginia in this respect, and now it is not required that an offense of the grade here charged shall be submitted to a grand jury for investigation as the basis of a prosecution and trial by a jury. If the position of the counsel for the commonwealth of Virginia be correct, then the provisions of section 643 of the Revised Statutes of the United States relative to

the removal of prosecutions from a State Court into a Federal Court are in great part rendered of no effect by the Virginia Statute. If this contention be sound, no officer appointed under or acting by the authority of any revenue law of the United States against whom a prosecution has been commenced in a State Court of Virginia is entitled to the protection contemplated by the United States statute, unless he shall have first been indicted by a grand jury in a court of record in that State. Under this view of the law, a court held by a justice of the peace in Virginia not being a court of record (4 Minor, Inst. 160), not having the machinery of a grand jury with which to commence a prosecution, no removal of a prosecution pending therein can be had, under the provisions of section 643 of the Revised Statutes of the United States. To give the statute the construction here contended for would be to admit that the State of Virginia can, by an act of its Legislature, practically repeal it as to this State by simply enlarging the jurisdiction of a court not of record, and by abolishing the action of a grand jury in all criminal cases, and substituting therefor some other mode of commencing a prosecution.

In support of the position taken by counsel that a criminal case arising under section 643 cannot be removed into this court where no indictment has been found in the State Court, the case of Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, is cited as a decisive authority. That was a case where a deputy marshal had been arrested on a warrant issued by a justice of the peace charging him with murder, and he was held in custody awaiting an investigation before the justice who issued the warrant. On petition of the prisoner, the case was removed into the Circuit Court before an indictment had been found in the State Court. The Supreme Court held (syllabus):

"A prosecution of a crime against the laws of a State, which must be prosecuted by indictment, is not commenced, within the meaning of section 643 of the Revised Statutes, before an indictment is found, and cannot be removed into the Circuit Court of the United States by a person arrested on a warrant from a justice of the peace, with a view to his commitment to await the action of the grand jury."

The case at bar not being a crime against the laws of the State of Virginia which must be prosecuted by indictment, the holding of the Supreme Court in that case is not applicable to this. While the language of the statute (section 643) contemplates that the prosecution will be commenced in a State Court of record, to give

it that construction would render abortive the effort of Congress to accomplish the manifest purpose of the statute. The law of Congress is constitutional, its object is clear, and the intention of the lawmaking power unmistakable. In such case, the law, if possible, must be so construed as to give effect to the purpose of its enactment. The object of the law is to protect the officers of the United States Government in the collection of the internal revenues, and in the enforcement of the internal revenue laws, against unjust and prejudicial prosecutions in the State courts; and whether the prosecution is commenced by indictment in a court of record, or by the issuance of a warrant of arrest on which the officer is to be tried by a justice of the peace, he is entitled to the protection secured him by this law. When the petition for removal in this case was filed with the clerk, he pursued the proper course in issuing a writ of habeas corpus *cum causa*, directed to the justice of the peace before whom the prosecution was pending. The case is properly in this court, and the motion to remand will be overruled.[1]

COMMONWEALTH OF VIRGINIA v. DeHART.

Circuit Court, W. D. Virginia. 1902.

119 Fed. 626.

McDowell, District Judge.—The point for decision in this case arises on a motion by the State to remand this cause to the State Court. The defendant was indicted by the grand jury of Floyd County for a felonious assault on one N. K. Thomas. On an informal petition, subsequently amended, filed under section 643, Rev. St. U. S. (U. S. Comp. St. 1901, p. 521), the cause was removed to this court. The motion to remand is based on the contention that the petition as amended does not allege the state of facts necessary to give this court jurisdiction. So far as now material, the amended petition alleges that a short time prior to the alleged assault the petitioner, while acting as a posseman

[1] Compare Virginia v. Paul, 148 U. S. 107, 118-122, 13 S. Ct. 536, 540-542, 37 L. Ed. 386, 390-392 (1893). But see State of Georgia v. Bolton, 11 Fed. 217 (1882); State of North Carolina v. Kirkpatrick, 42 Fed. 689, 690 (1890).—Ed.

under a deputy collector of internal revenue, had assisted in destroying an illicit distillery belonging to the aforesaid N. K. Thomas; that he appeared as a witness, and had testified against Thomas at the preliminary hearing, and was recognized as a Government witness to appear and testify against Thomas at the then next term of the Federal Court. At this juncture—between the examining trial and the term of court at which Thomas was to be tried for operating an illicit distillery—the petitioner was summoned by a deputy United States marshal to assist in an effort to arrest one Agee for a violation of the Federal revenue laws. "While in the discharge of such duty, and while acting under and by authority of said officer, petitioner was set upon by said N. K. Thomas, who told your petitioner that, on account of his having reported said Thomas' still to the Government officers, and on account of his having, while acting under and by authority of a deputy collector of the United States, assisted in the cutting up and destruction of said Thomas' still, and on account of the evidence given by your petitioner against him before the commissioner, and to prevent such evidence being repeated by your petitioner at the November term of the said District Court, he intended to kill your petitioner. And as he said this, said N. K. Thomas thrust his hand in his pocket and drew therefrom a pistol. Your petitioner, acting in the capacity of a Government officer, also had on his person a pistol, which he drew from his pocket, and, without attempting to fire on the said N. K. Thomas, struck him in self-defense, and thereby prevented the said N. K. Thomas from carrying out the threats made not only at that time, but on previous occasions." There is no room for doubt that a deputy marshal, while executing, or on the way to execute, a warrant for the arrest of one charged with a violation of an internal revenue statute is "an officer acting by authority of a revenue law." Carico v. Wilmore (D. C.), 51 Fed. 196. And the petitioner—as he was acting under such an officer—is within the intent and letter of the statute (Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574), if the prosecution is on account of an act done under color of office or of any revenue law, or if the prosecution is on account of any right or authority claimed under any revenue law. Possibly the mere fact that the assault made by Thomas on the petitioner grew out of the prior actions of the petitioner while acting under the deputy revenue collector may have no bearing on the question here. If, years after a revenue collector has left the Government service, he is attacked because

of some act done by him while in the service, and if, in repelling the attack, he kills the one who assaults him, his act is not one done under color of office or of any revenue law, nor is it an act done under a right or authority claimed under any revenue law. The only right that could be claimed in such case would be the right of self-defense. Again, suppose that a revenue officer, while holding a commission, but while quietly at his home, and while not engaged in any official duty, is attacked because of some act previously done by him in the performance of his official duty, and in repelling such attack he kills the person who assaulted him, and is indicted therefor in the State Court. It would seem that the act of killing here is not done under color of office or of any revenue law, nor under a right properly to be claimed under any revenue law; but that the officer in this case is again merely exercising the right of self-defense. While Congress might well have extended the right of removal to cover such a case, the language employed in section 643 may not be quite sufficient to do so. Illinois v. Fletcher (C. C.), 22 Fed. 778. However, the petition here sets up certain other facts which I think do show a *prima facie* right to a trial in this court. These facts are that, the petitioner having been duly summoned as a posseman by a revenue officer, who was "seeking to arrest" an offender against the revenue law, and while the petitioner was "in the discharge of such duty" he was set upon by Thomas, who declared his purpose to kill petitioner, and the latter in self-defense struck said Thomas. If a revenue official (the law being the same in the case of one acting under such official as his posseman), while "hot-foot" after a fleeing violator of a revenue law, is set upon by friends of the fugitive, who seek thus to prevent the arrest, and if, in resisting the assault, the officer kills one of the party, his act in so doing is certainly one done under color of office, or one done under a right claimed under a revenue law. "Colorable" is defined as "having the appearance, especially the false appearance, of right." In the case supposed it was the duty of the officer to arrest the fugitive. To execute his duty he had to repel the assault, or to abandon his pursuit. The killing, then, was, to say the least, done colorably in the line of official duty. Does it alter the case if we suppose that the person or persons who interfere with the officer's pursuit are actuated, not by a desire to prevent the arrest, but by a mere personal desire to injure the officer? In such case, if the assault be not repelled, the officer cannot proceed with the execution of his official duty. Conse-

quently it is not a strained construction of the statute to hold that when an attack is made on a revenue officer, while he is in the actual pursuit of a violator of the revenue laws, by a third party actuated by mere personal malice towards the officer, and the officer, in repelling the attack, wounds or kills the person attacking him, such act is one done, at least colorably, in the line of official duty. Nor can a distinction be properly drawn, if, instead of being in actual pursuit, the officer is merely on the way to make an arrest, or merely seeking an offender with intent to arrest him when found. It seems to me that it is as much the officer's right, even if not as much his duty, to proceed on his way, or to proceed with his search, as it is to pursue when the offender is in sight and is fleeing. If interrupted by one who assaults him—no matter what cause actuates the person making the assault—the officer has as much right to repel the assault in the one case as in the other. To be sure, the same necessity for immediate action may not exist in both cases. It is true that, when the officer is merely traveling on the way to make an arrest, he could, perhaps, by a timely retreat, avoid the necessity of injuring the one attacking him. But this might also be true if he were attacked while in hot pursuit of a fleeing criminal. And in either case his act in repelling the assault is at least colorably done in the exercise of his official duty; for in either case it is his official duty to proceed, whether with the actual pursuit of a fugitive, or with his journey, or his search for an offender. Any one who, while the officer is thus engaged, attacks him, is, in some measure, interfering with the performance of an official duty. And in repelling the attack the officer is at least colorably performing such duty. The mere fact that the officer's chief thought or sole thought is self-defense does not eliminate from the case the fact that in repelling the assault he is, at least colorably, proceeding with his official duty. And I am not disposed to emasculate the statute by such refinements as making the right of removal depend on whether the thought uppermost in the officer's mind was self-defense, or an intent to proceed with the execution of his duty—necessarily putting his assailant *hors de combat*, in order that he might be at liberty to so proceed. The intent of section 643, Rev. St. (U. S. Comp. St. 1901, p. 521), is to afford to revenue officials and their assistants protection from local prejudice against Federal revenue laws and revenue officials. The language of the statute does not authorize a removal of every prosecution against a revenue officer; but the words "under color of" and "right or

authority claimed'' show clearly that the act for which the prosecution is commenced need not be one done strictly in pursuance of a Federal revenue statute in order to justify removal. If, for instance, a revenue officer, while not even colorably engaged in the performance of duty, sets fire to a neighbor's dwelling, he should be tried for his arson by the State Court. But if, while seeking to arrest a violator of a revenue law, who is fortified in his dwelling, the officer—even without sufficient justification—sets fire to the house in order to effect the capture, the trial of the charge of arson made against him should be removed to the Federal Court.

The conclusion I reach is that the petition here shows on its face a right of removal. The motion to remand is overruled.[1]

STATE v. SULLIVAN.

Circuit Court, W. D. North Carolina. 1892.

50 Fed. 593.

At Law.—A motion to proceed with the trial of this case, removed from the State Court, the State Court having declined to recognize the right of removal, and tried the case.

DICK, District Judge.—Many State and Federal courts of the highest authority have heard argument and carefully considered questions of law arising under section 643 of the Revised Statutes of the United States,[2] and in able, elaborate, and positive decisions declared its constitutionality, and forcibly announced the wise and just principles of public policy upon which it is founded. * * *

Upon careful examination of the proceedings instituted for the removal of this case from the State Court to this court for trial,

[1] For further cases dealing with the question as to when one is an ''officer appointed under or acting by authority of any revenue law'' etc., see Van Zandt v. Maxwell, 28 Fed. Cas. No. 16,884, 2 Blatchford 421 (1852); Carico v. Wilmore, 51 Fed. 196 (1892); Davis v. South Carolina, 107 U. S. 597, 2 S. Ct. 636, 27 L. Ed. 574 (1882). But see Benchley v. Gilbert, 3 Fed. Cas. No. 1,291, p. 158, 8 Blatchford 147 (1871); Victor v. Cisco, 28 Fed. Cas. No. 16, 934, p. 1177, 5 Blatchford 128 (1862).—Ed.

[2] The statute involved in this case was, in most respects, similar to section 33 of the Judicial Code.—Ed.

I find that they are in substantial conformity to the act of Congress. The petition of the defendants represented that they were officers and agents of the Government, duly appointed and acting under the revenue laws of the United States, and that the acts for doing which they are criminally prosecuted in the State Court were acts done under color of their office and employment, and in the performance of their official duties, in the enforcement of said revenue laws. The representations set forth in their petition, showing the nature of the prosecution and the authority and the circumstances under which they acted, were duly verified by oath, and by the certificate required by law to be given by the legal counsel of the petitioners. As the Circuit Court was not in regular session, the petition was presented to the deputy clerk of such court at his office in Statesville, and was duly filed in said office, and the case was thereupon entered on the docket of the Circuit Court, to be proceeded with as a case originally commenced in said court, and a writ of certiorari was duly signed and issued by a regularly appointed and qualified deputy clerk, acting in the name of the clerk of the court. This writ was placed in the hands of the marshal of this district, and a duplicate copy was delivered by him to the clerk of the State Court before the commencement of the trial of the case in said court. As the defendants were on bail, and not in actual custody, a writ of habeas corpus *cum causa* was not applied for in the petition, and was not issued by the deputy clerk. The recognizance in the State Court was transferred by operation of law in the removal of the case, and the defendants were under obligation to appear in this court and answer the charges in the indictment found by the grand jury of the State Court.

I entertain the opinion that when proceedings for the removal of a criminal prosecution from a State Court to a Federal Court for trial are in conformity to the act of Congress providing for such removal, the representations averred in the petition of defendants, constituting sufficient grounds for removal, verified by oath and by certificate of counsel, must be accepted as true, and the case is *ipso facto* removed to the Circuit Court, and the jurisdiction of the State Court is at an end, unless the case shall be remanded thereto. Spear, Fed. Jud. 484. The rights of the defendants and the jurisdiction of the Circuit Court depend upon the authority of law, and not upon the correct performance of a ministerial duty by the clerk of the court. The act of Congress does not invest the clerk with any judicial function or discretion,

but commands him to issue the prescribed auxiliary remedial process to prepare the case for trial. No duly authenticated record of the State Court has been returned by the clerk, in obedience to the writ of certiorari, but I am informed that no objection was made in the State Court as to the regularity and sufficiency of the proceedings for removal up to the time of filing the petition in the office of the clerk of this court, and the entering of the cause upon the docket. The refusal of the court to recognize the right of removal was founded upon the fact that the writ of certiorari was not personally issued by the clerk; and the court was of opinion that such writ, signed and issued by the deputy clerk in the name of the clerk, was irregular, erroneous, and void. The act of Congress, in express terms, prescribed the nature of the representations that must appear in the petition, the method of verification, and the manner of filing the same. When these requisites are complied with, the proceeding at once has the operative force and effect of removing the case, as the statute positively declares that "the cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court." This clause, so clear and imperative in its terms, must, under a reasonable construction, have the force and effect of conferring paramount jurisdiction on the Circuit Court, and full power to proceed, at once, to have the cause prepared for trial. This jurisdiction is as complete and plenary as if the cause had been originally commenced in the court. As this court had rightfully acquired jurisdiction under a paramount constitutional law of the United States, the State Court was divested of its former jurisdiction and could not legally proceed to try the cause. The writ of certiorari mentioned in section 643 is an auxiliary writ of the court, issued by its ministerial officer, the clerk, or the regularly appointed and qualified deputy clerk, in order that the removed cause may be tried as fairly and speedily as possible. The purpose of issuing such writ is to procure the record of the State Court, so that the Circuit Court may proceed with the case where the jurisdiction of the State Court ceased. This writ was also intended to give the State Court notice of the removal of the cause so that it might have an opportunity of complying with a duty expressly imposed by a paramount law of the Federal Government. The subsequent clause in the statute, declaring that "the suit or prosecution upon the delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial,

or judgment therein in the State Court shall be void," was intended as a positive inhibition of any further proceeding in the State Court, and to authorize the Circuit Court to proceed in the manner provided. Conceding for a moment that the objection to the ministerial process of this court has some legal foundation, it is merely technical, and does not affect the merits of the case. As the process issued from a court having rightful and competent jurisdiction of the case, it was not void, and could only be irregular or erroneous. Even if it was irregular or erroneous, it gave full and explicit notice of the assumed jurisdiction of the court, and of the rights claimed by the defendants under the Constitution and laws of the United States, as well defined and established by decisions of our State Supreme Court and the Supreme Court of the United States. State v. Hoskins, 77 N. C. 530; Tennessee v. Davis, 100 U. S. 257; Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. Rep. 636. Under such circumstances it seems to me that the State Court could, as a matter of comity and common justice, have given the defendants a reasonable opportunity of having a mere irregularity of proceeding corrected, and thus administer substantial justice, and avoid any occasion for conflict of jurisdiction between a State and Federal Court exercising jurisdiction in the same territorial limits. Judicial controversies are always unpleasant and unseemly, and should be avoided, unless such conflicts are necessary to a proper enforcement of the law,— to secure the legal rights of citizens, the right of the Government, and the impartial administration of justice. The defendants, by making the best defense they could in the State Court, neither lost nor impaired in the least degree their right of trial in this court, which was claimed by them in the manner provided by law. Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. Rep. 58.

I will now proceed to consider more particularly the nature of the writ of certiorari, issued by the deputy clerk of this court in the name of the clerk, to ascertain whether the action of the deputy was in accordance with official duty and power. At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for re-examination of some action of an inferior tribunal; and (2) as auxiliary process to enable a court to obtain further information upon some matter already before it for adjudication. U. S. v. Young, 94 U. S. 258. It was for this last purpose that the writ was issued in this case. In its relations to this court the State Court is in no sense of the word an inferior court. The proceedings in this case are appellate in

their nature. They were instituted under a positive and constitutional law, which entitled the defendants, upon making a certain representation of facts, in a properly verified petition, to have a case untried and pending in a State Court having jurisdiction removed for trial to a Federal Court which had in accordance with law, acquired, not concurrent, but paramount, jurisdiction. A court must have competent jurisdiction of a matter before it can award a writ of certiorari. When a valid law confers upon a court jurisdiction to issue a writ of certiorari, such jurisdiction must necessarily be superior to the jurisdiction to which the writ is directed; for such writ commands the performance of a duty. Such superior jurisdiction is derived from positive law, and is in no way dependent upon the formal correctness of the writ which the court issues in order that it may exercise its vested jurisdiction with intelligence and dispatch. When this case was properly entered upon the docket of this court, jurisdiction to issue the writ of certiorari and try the case was conferred by the act of Congress, and was superior to the jurisdiction of the State Court. The writ issued did not enlarge the jurisdiction of the court, but was only auxiliary process, to obtain the record of the case, and enable this court to exercise jurisdiction speedily and justly. Conceding for a moment that Congress has the power to confer judicial functions upon a clerk of a Circuit Court, no such legislative intention can be inferred from the language of imperative command used in the statute,—the clerk "shall issue a writ of certiorari to the State Court, requiring it to send to the Circuit Court the record and proceedings in the cause." If a judge in court had made such an order, a deputy clerk would undoubtedly have acted as a ministerial officer in issuing the writ. The positive order of the law is certainly as mandatory as the order of its judicial officer. This writ is generally awarded as an auxiliary to the exercise of judicial authority, but there is nothing in the Constitution that prevents Congress from directing the clerk of a court to issue such writ in his ministerial capacity. A return to the writ can properly be made by the clerk of the inferior court under his hand and the seal of the court. If the defendants in this case had been in actual custody, and in their petition had made application for a writ of habeas corpus *cum causa,* there is no reason why the deputy clerk should not have issued the writ. This is not the high prerogative writ of habeas corpus, which can only be awarded by judicial authority. All kinds of writs of habeas corpus are subject to the control and

regulation of Congress, acting within the limits imposed by the Constitution. Congress has conferred power upon the courts of the United States to issue "writs of habeas corpus," and this grant of authority includes every species of the writ. Rev. St. U. S. § 751; Ex parte Bollman, 4 Cranch 75. In section 752, Congress has only conferred power upon the judges of said courts, in vacation, to award writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty,—the high prerogative and judicial writ. In section 643, Congress has been proper to employ the old common-law writ of habeas corpus *cum causa* to be issued by a court in session, or clerk of the court in vacation, in the removal of certain specified cases from State courts to Federal courts for trial. This writ had become almost obsolete in England and this country, and we must look to the common law to ascertain its nature and application. This old common-law writ issued out of the courts of Westminster, and afforded a very liberal and expeditious mode of procedure for the removal of causes. It was grantable of common right, at all times, without any motion in court, and it instantly superseded all proceedings in the court below. It was awarded by the law without the leave of the court. Ex parte Bollman, *supra;* 3 Bl. Comm. 130; Tidd, Pr. 297. Upon a fair and reasonable construction of section 643, it is evident that Congress well knew the nature of the common-law writs mentioned, and intended them to be employed by the Circuit courts as auxiliary and expeditious remedial process in the removal of causes, and in aid of jurisdiction already acquired by the filing of a petition in conformity with the requirements of the statute. To this end the law positively directs and commands the clerks of such courts to issue such remedial process when the courts are not in session. * * *

I have been informed that the Supreme Court of this State has affirmed the judgment of the court below in this case, but I have not seen the opinion filed. I desire to have an opportunity of carefully reading and considering such opinion before I proceed further. I have confidence in the ability, integrity, learning, and patriotism of the justices who preside in that distinguished court; and I have learned that questions of law arising upon the face of the record were discussed and determined which were not presented on the trial in the court below. It is ordered that this case be continued to the next term, and that the defendants enter into recognizance for their appearance.

The solicitor of the State for this district, being present, waived any further notice of this proceeding of the court.

Supplemental Opinion.

(At Chambers. March 14, 1892.)

Since delivering and writing the foregoing opinion, I have seen the decision of the Supreme Court of this State (14 S. E. Rep. 796), affirming the judgment of the court below. I will make no comment on the general tone and spirit of the language of the court, but will only view it as an honest, strong, and decided expression of judicial opinion, manifesting a jealous and watchful care over the jurisdictional rights of State courts. The principal ground of the decision was the question of law discussed and decided in the Superior Court, as to the right and power of a deputy clerk, in the name of the clerk, to receive and file the petition for removal, and to issue the auxiliary writ of certiorari that was served by the United States marshal upon the clerk of the State Superior Court, and subsequently read in open court before the trial of the case. Upon this subject, I have nothing to add to what I have already said in my foregoing opinion, except to express my surprise at the legal conclusions of the distinguished court which has so often shown a liberal and enlightened policy in defining the ministerial functions of a clerk of a court, and in sustaining the action of deputy clerks in facilitating the administration of substantial justice.

It is not my purpose to discuss at any length the questions of law considered by the State Supreme Court, which were not relied upon in the trial of the case in the court below. I desire simply to express my nonconcurrence, and offer a few reasons that influence me in my opinion. I certainly do not concur in the views of the Supreme Court in regard to a strict and technical construction of the removal statute referred to. Section 643, Rev. St. U. S. This statute is a part of the revenue system of the general government, and the United States Supreme Court has often decided that revenue statutes are remedial in their nature, and are to be construed liberally to carry out the purpose of their enactment; and what is implied in them is as much a part of the enactment as what is expressed. The intention of the lawmakers and the reasons and object of the law are considerations of great weight in the construction of the statute. Smythe v. Fiske, 23 Wall. 374. In the opinion of the Supreme Court it is insisted that the writ of certiorari issued by the clerk of the Circuit Court in this case was not in proper form and properly directed. I

will readily concede that such writ is not in conformity with a writ of certiorari at common law, but there is good reason in this case for a departure from such usual and established form. At common law the certiorari is a writ issued by a Superior Court having jurisdiction, directed to an inferior court, commanding it, through its clerk, to certify and return the record and proceedings in a particular case pending before it to the higher court. A court that has authority to command the performance of a duty has competent power to enforce obedience by compulsory process. Circuit courts of the United States are not higher courts than the State Superior courts, and under the provisions of section 643 have no authority to command State courts and enforce obedience. Under this section, Congress has not invested the Circuit courts with any such coercive authority, but provision has been made for such courts to notify and require the State courts to certify their records and proceedings; and, if such requirements are disregarded, Circuit courts can supply the record, and proceed to make disposition of cases removed without the requested assistance of the State courts. Under such circumstances, I am of opinion that the writ of certiorari in this case was appropriate, and is not justly subject to criticism for informality. It was issued under the seal of a court of competent jurisdiction, was delivered to the clerk of the State Court by the marshal, was read in open court before the trial, respectfully gave information to the State Court of the sufficient grounds upon which Circuit Court assumed jurisdiction, and notified the State Court of the duty imposed upon it by law. The purpose of issuing the writ of certiorari was not to require the State Court to surrender jurisdiction and remove the cause to the Circuit Court, but simply to require a return of the record of the case, duly authenticated by its clerk. Under this statute the State courts have no essential agency in the removal of causes. All proceedings for removal are conducted in the Circuit Court, and the auxiliary writs of certiorari and habeas corpus *cum causa*, served on the clerk of the State Court, are not essential to removal, but are used after the Circuit Court has acquired jurisdiction for the purpose of notifying the State Court of such assumed jurisdiction, and preparing the removed case for trial. The Circuit Court does not command that State Court to surrender jurisdiction, for such jurisdiction is transferred to the Circuit Court by the operation of a paramount law. This operation of law cannot be justly regarded as arbitrary and despotic, as it was put in force by the legislative representatives of a free and enlightened people,

and has been sanctioned by long experience and by the decisions of the highest judicial tribunal of the nation, and pronounced to be essential to the safety and efficient operation of the Federal Government. A case removed under this statute is tried in accordance with State laws, by a jury composed of the best citizens of the State, under the direction of a judge bound by official obligation to correctly administer such State laws.

It is further insisted in the opinion of the State Supreme Court that the writ of certiorari in this case is defective, in that it does not show on the face that the clerk had expressly adjudged the petition to be sufficient to serve the purpose contemplated. The statute declares in clear and express terms what representations of facts in the petition, and what verification, shall give the petition filed the force and effect of removing the case. The truth of such representations is matter of subsequent inquiry and determination. The only duty imposed upon the clerk is to examine the papers and see that the formal requirements of the law are complied with. He determines these matters by the ministerial acts of inspection and comparison, and manifests his approval in no other way than by filing the petition in his office, and entering the case on the docket. This implied approval clearly appears in the writ of certiorari that was issued in this case.

It is further insisted that "the process going from the Circuit Court to the State Court must state the substance of the ground of the authority of the former, and the purpose of the command of the writ." This alleged requisite, if adopted in practice, would introduce a novel feature into a writ of certiorari, unknown to the common law. At common law, it was a prerogative writ,—a mandate of the crown,—issued by a court that was invested with a plentitude of power over all inferior courts of the realm, and had a right to command them to return authenticated records and proceedings in a particular case for trial or correction of errors. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress; and the nature and purpose of the writ has been set forth in acts of Congress, and in frequent decisions of Federal courts. It seems to me that it would be unnecessary and improper for a Circuit Court of the United States, in removal proceedings, to inform a State Court, in more specific terms than were used in this case, of the grounds of its authority, and the purpose of the writ, when such matters are disclosed by public and paramount law, presumed to be well known to all courts.

It is further insisted that the proceedings before the clerk of the Circuit Court were defective and insufficient to effect a removal of the case from the State Court, in that no writ of habeas corpus *cum causa* was issued by said clerk. As the defendants were on bail, and not in actual custody, a writ of habeas corpus was unnecessary. The bail bond filed in the State Court, by express provision of law, was effectual to secure the appearance of the defendants in the Circuit Court. The defendants made no application in their petition for a writ of habeas corpus. Before such a writ can be properly issued, it must be applied for, and the petition must allege that the party is imprisoned or detained against his will without authority of law.

I have prolonged this discussion further that I at first intended. The judgment of the Superior Court against the defendants for the offense with which they were charged and convicted by a jury was not oppressive or unreasonable. I feel sure that the judge of the Superior Court, in his ruling, was prompted by a high sense of judicial duty. I entertain the highest respect for the State Supreme Court, and read with pleasure and benefit its able, learned, and instructive opinions; and I sincerely regret that an occasion has arisen which has produced a conflict of judicial opinion and authority.[2]

In the State of Virginia v. Felts, 133 Fed. 85 (1904), McDOWELL, District Judge, speaking in relation to a statute similar to section 35 of the Judicial Code, said:

"Where the petitioner has paid or tendered to the clerk of the State Court his proper fees, and the clerk fails or refuses to furnish a properly certified copy of the record, I think a writ of certiorari should issue. This has been done in some cases (Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; State v. Sullivan (C. C.), 50 Fed. 593), and the mere absence of an express provision in section 643 allowing such a writ to issue does not justify a refusal to issue it. Section 645 is authority for supplying the record either by affidavit" or otherwise.

"The case of a pauper petitioner might present some diffi-

2 Only a portion of the opinion is reprinted.

For a further definition of "habeas corpus cum causa," see 2 Bouvier's Law Dictionary, Rawle's Third Edition, p. 1407.

Compare State v. Sullivan, 110 N. C. 513, 14 S. E. 796 (1892).—Ed.

culties. Neither the State statute (section 3538, Code 1887 (2 Code 1904, p. 1890), nor the Federal statute (Act July 20, 1892, c. 209, 27 Stat. 252; 1 U. S. Comp. St. 1901, p. 707), covers the case. If the petitioner were unable to pay the fees of the State clerk, perhaps the best course would be to supply the contents of the indictment by affidavit."

GUERNSEY v. CROSS.

Circuit Court, D. Maine. 1907.

153 Fed. 827.

Hale, District Judge.—This action at law was begun in the Supreme Judicial Court of the State of Maine for the County of Piscataquis by a writ of attachment against the property of the defendant, who is alleged to reside in Boston, in the Commonwealth of Massachusetts. The writ was returnable at Dover, in said County of Piscataquis, on the last Tuesday of February, 1907, and was entered on that day in that court. It appears by the record of the State Court before me that upon the second day of the term a motion to dismiss was filed. The motion to dismiss alleges that the State Court had no jurisdiction over the defendant's person, because the defendant was a non-resident of the State, and because it does not appear by the writ and officer's return of record that he was ever served with process within the limits of the State, or that any property belonging to him was found within the State, or that there had been any service of writ or process upon his tenant, agent, or attorney in the State of Maine. The motion further alleges that the writ should be dismissed for the reason that the action is brought by the plaintiff in the capacity of trustee in bankruptcy of the Dews Woolen Company, a corporation organized under the laws of Maine, and having its place of business in Dexter, in the County of Penobscot; that the defendant is a non-resident of Maine; and that the action should have been returnable in Penobscot County, the residence of the bankrupt corporation, and not in Piscataquis County, where the trustee in bankruptcy resides. The record shows that the motion to dismiss was overruled on the day of its filing, and there-

upon exceptions were taken by defendant, and were filed and allowed. Counsel on both sides admit that the motion was argued in the State Court, and was decided upon argument in that court. Without carrying the exceptions forward, however, the defendant appears by the docket entries to have presented his removal papers after the motion to dismiss had been overruled and exceptions taken. The State Court thereupon proceeded no further. The case therefore comes to this court by removal. On April 16th, the first day of the April term of this court, the defendant filed a motion to dismiss the writ. The motion is the same, in substance, and practically the same in form, as the motion made and overruled in the State Court.

It appears, then, that the Supreme Judicial Court of Maine acted upon this question before the removal of the cause to this court, and that it had jurisdiction in the premises. The defendant's motion was overruled in the State Court, after a full presentation of the same to that court and arguments upon it. The defendant excepted to the ruling of the State Court. Instead of waiting, however, to prosecute his exceptions before the appellate tribunal of the State, he removed the cause to the Federal Court. The renewal of the same motion in the Federal Court is practically an attempt to appeal the cause from the State Court to the Federal Court upon the questions which arise under this motion. The motion in this court is based upon a misapprehension of the effect of renewals from the State Court to the Federal Court. Upon removal of a cause, the Federal Court does not, in any way, act as a court of appeals. It takes the case precisely as it finds it, accepting all decrees and orders of the State Court as adjudications. In this case, we might have had a very serious doubt upon one question arising under this motion, if the motion had come before us in the first instance, instead of having been presented to, and decided by, the State Court, before the removal of the cause. But we take the cause as we find it when it left the State Court. We cannot treat the decree of that court as a nullity.

In Duncan v. Gegan, 101 U. S. 810, 812, 25 L. Ed. 875, in delivering the opinion of the Supreme Court, Mr. Chief Justice WAITE said:

"The transfer of the suit from the State Court to the Circuit Court did not vacate what had been done in the State Court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State

Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had remained there. It takes the case up where the State Court left off. * * * Duncan, who caused the removal to be made, is the only party who complains of the decree below, and he cannot object here to what has been done below by his own procurement." Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; French v. Hay, 22 Wall. 231, 22 L. Ed. 799; Brooks v. Farwell (C. C.), 4 Fed. 166; Loomis v. Carrington (C. C.), 18 Fed. 97; Allmark v. Platte S. S. Co. (C. C.), 76 Fed. 615; Bragdon v. Perkins-Campbell Co. (C. C.), 82 Fed. 338.

In Bragdon v. Perkins-Campbell Co., *supra,* the Federal Court applied the rule to a State of facts very similar to that presented in the case at bar.

In Loomis v. Carrington, *supra,* the Federal Court expressed doubt as to the correctness of the ruling of the State Court, but stated the rule as the Supreme Court has given it in Duncan v. Gegan, *supra.*

In Milligan v. Lalance Co. (C. C.), 17 Fed. 465, Judge BROWN stated the rule as we have given it. He took action, however, upon a matter which had been pending in the State Court when the cause was removed, but which had not been decided in that court. Judge BROWN said:

"If this motion were in the nature of an appeal, or even of a motion for rehearing or reargument, as the plaintiff contends, it must have been denied. But it cannot be so considered. At the time the cause was removed, a motion for a modification of the order had been entertained by the general term, and was then pending and unheard. That application must be disposed of by this court. It is brought before it by means of this motion, and in disposing of it this court must necessarily act as the general term, and may and should make any proper order consistent with the prior general term decision, which, upon that motion, it was competent for the general term to make."

In Miner v. Markham (C. C.), 28 Fed. 387, 395, the Federal Court acted upon a matter where the State Court had denied the motion, but had expressly held that it was without prejudice to a renewal of the same. The court held that under those circumstances the defendant had not waived his privilege, and could assert it in the Federal Court with the same force and effect as if

the suit had been brought and the motion made in the Federal Court in the first instance, citing Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237.

If, then, in the case at bar, the defendant had made his motion to dismiss, and, pending such motion, and before its denial, had removed the cause to this court, he could be heard in this court upon that motion, under Judge BROWN'S decision in Milligan v. Lalance, etc., Co., *supra*. If the defendant had made his motion in the State Court before removal, and the State Court had denied his motion, but had made a special ruling that such denial was without prejudice to its renewal, we could then have held that the defendant had not waived his privilege, but could assert it in the Federal Court with the same force that he might have renewed it in the State Court, or that he might have made it in this court if the suit had been brought in the first instance in this court. Miner v. Markham, *supra*.

But this cause presents a clear case for the application of the general rule in Duncan v. Gegan, *supra*. The defendant made his motion to dismiss in the State Court, before the removal of the cause to this court, argued it to the State Court, was overruled by the State Court, and filed his exceptions in the State Court. He cannot now be heard to object to what was done in the State Court by his own procurement. The Federal Court takes a case up where the State Court left it, and must recognize the decree which the State Court made upon a question withir its cognizance.

The motion of the defendant is overruled.

MONTGOMERY COUNTY v. COCHRAN.

Circuit Court, M. D. Alabama. 1902.

116 Fed. 985.

JONES, District Judge.—Counsel agree that the failure to demand a jury in the State Court cannot effect the right to a jury trial in the courts of the United States. Of the correctness of this conclusion there can be no doubt. The waiver effected by the State law applies only to the right of jury trial given by the Constitution of the State in the State Court. The right to a jury

here depends upon the Constitution of the United States. State laws cannot effect this right. The reason which induced the order of removal make it proper that citizens of the County of Montgomery shall not serve on the jury. The parties will have an opportunity to agree upon the part of the district from which the jurors will be summoned, before any order is made on that subject.[1]

SECTION IV.

MISCELLANEOUS PROVISIONS.

UNITED STATES v. RODGERS.

Supreme Court of the United States. 1893.

150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.

MR. JUSTICE FIELD delivered the opinion of the court.

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indictment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. * * *

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terrae*, where a man may reasonably discern between shore and shore, is or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." De Jure Maris, c. iv. By the "main

1 Only a portion of the opinion is reprinted.

The question of jurisdiction, though already decided by the state court, may, upon removal, be passed upon by the Federal Court. Hudson Nav. Co. v. Murray, 236 Fed. 419, 422 (1916). But see Hoyt v. Ogden Portland Cement Co., 185 Fed. 889, 899-900 (1911).

As to the right of the Federal Court to dissolve or modify proceedings of the State Court, see Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 141-142 (1910).—Ed.

sea'' Hale here means the same thing expressed by the term ''high sea''—''mare altum,'' or ''lehaut meer.''

In Waring v. Clark, 5 How. 440, 453, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II. and Henry IV., ''that high seas mean that portion of the sea which washes the open coast.'' In United States v. Grush, 5 Mason 290, it was held by Mr. Justice STORY, in the United States Circuit Court, that the term ''high seas,'' in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terrae* on the sea coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the ''high seas'' in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offenses were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the County of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term ''high seas'' would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term ''high seas'' does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters—the latter being termed the high seas. In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion ''surrounded or enclosed between narrow

headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean (meaning outside of the enclosed waters along its coast), upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as the sea, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large

extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.[1]

UNITED STATES v. TOWNSEND.

District Court, S. D. New York. 1915.

219 Fed. 761.

Henry C. Townsend was indicted for assault on a member of his crew on the high seas and filed a plea in bar to the court's jurisdiction, to which the Government demurred. Overruled.

POPE, District Judge.—The defendant, Townsend, is indicted for having, while master of the sailing vessel Manga Reva, and while upon the high seas on the trip from San Francisco to New York, committed an assault upon one John Shea, a member of his crew. The indictment is under section 291 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1145 (Comp. St. 1913, § 10464), which so far as here material, reads as follows:

"Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, * * * any of the crew of such vessel," shall be punished as provided by law.

The plea in bar, elucidated by the mutually conceded facts at

[1] Only a portion of the opinion is reprinted.

Waters which once were a part of the "high seas" may, by enclosing them by breakwaters, cease to constitute a portion of the "high seas." Ex parte O'Hare, 179 Fed. 662, 103 C. C. A. 220 (1910).

To the effect that "out of any particular state" means out of any state of the union, see United States v. Pirates, 18 U. S. (5 Wheaton) 184, 200, 5 L. Ed. 64, 68 (1820).

For the meaning of "district," see United States v. Newth, 149 Fed. 302, 302 (1906).—Ed.

the hearing, shows that the defendant brought his ship upon the end of her voyage to her pier in the Borough of Brooklyn, County of Kings, and thus in the Eastern District of New York. He was there arrested by a deputy United States marshal for the Eastern District of New York upon a warrant issued by a United States commissioner for that district, and, upon being arraigned before such commissioner, was held to appear before the District Court of the United States for the Southern District of New York. Subsequently the present indictment was found against him in this court. The question is whether the offense is properly laid in this district, or whether the case must be tried in the Eastern District of New York.

(1) The venue of such cases is prescribed by section 41 of the Judicial Code, as follows:

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or unto which he is first brought."

(2) A brief consideration of the meaning of the terms employed will be helpful. The difference between "brought" and "found" is the difference between presence of involuntary and voluntary act. By "brought" is meant taken, or carried. An illustration of this is where the violator of law upon the high seas is, following the crime, taken into custody upon the ship and then brought into port. On the other hand, where the defendant, not having been taken into custody, is, after reaching port, arrested or apprehended under lawful authority for trial for the offense, he is deemed to be found wherever such arrest occurs. Under the statute, the prosecution may be either in the district where the defendant is first brought (i. e., taken), or where he is found (i. e., apprehended). Kerr v. Shine, 136 Fed. 64, 69, C. C. A. 69, and cases cited. In the present case the defendant was not brought into this district, nor, indeed, into any district, for, as we have seen, he himself brought his vessel to Brooklyn. Neither was he found in this district, for, as we have seen, he was arrested on his vessel in Brooklyn. It follows therefore that he was neither found nor brought into this district, and, unless a further consideration, now to be mentioned, prevails, he cannot be tried here.[1]

[1] Only a portion of the case is reprinted.—Ed.

UNDERWOOD TYPEWRITER CO. v. FOX TYPEWRITER CO.

Circuit Court, S. D. New York. 1907.

158 Fed. 476.

RAY, District Judge. * * * I do not think it necessary to allege and show under the statute referred to (Act March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 589)), in order to confer jurisdiction on this court, that the defendant Fox Typewriter Company, Limited, or its successor the Fox Typewriter Company, a corporation, had a regular and established place of business in the Southern District of New York at the time when the acts of infringement were committed in such district. Jurisdiction is conferred and obtained if the defendant committed the acts of infrngement in such district before suit brought, and if when suit was brought the defendant liable for the infringement had a regular and established place of business in the district. This is the plain reading of the statute, and its plain purpose. The language is:

"That in suits brought for the infringement of letters patent the Circuit courts of the United States shall have jurisdiction in law, or in equity, in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service * * * may be made. * * *"

The words "shall have committed" and "have a regular," etc., are significant. The first relates to the past—to a time prior to bringing the suit—the last, to the time of bringing the suit. The existence of a place of business in the district where suit is brought at the time of the commission of the acts of infringement is entirely immaterial. If a resident and inhabitant of one district goes into another and commits acts of infringement therein, having no regular and established place of business there, and thereafter establishes a regular place of business in such district, and has it when sued, jurisdiction exists and is obtained if the service of process be regular and made in accordance with the statute. Congress did not intend to exempt infringers living in one district

from suit to another where they commit their unlawful acts on the ground that when so committing the acts they had not established and did not maintain a regular place of business in such district. It was not intended to offer an exemption from suit in the district where infringement was practiced if the wrongdoer would not establish and maintain a regular place of business there while doing the acts. It did intend such infringers might be sued in such district provided they had, at the time of suit brought, "a regular and established place of business" in such district, so that lawful service could be made in the district on the defendant, or on his agent engaged in conducting such business there. Walker on Patents (4th Ed.) 330, § 389; Feder v. A. B. Fielder & Sons (C. C.), 116 Fed. 378; Bowers v. Atlantic G. & P. Co. (C. C.), 104 Fed. 887, 888; Westinghouse E. & Mfg. Co. v. Stanley E. Mfg. Co. et al. (C. C.), 121 Fed. 101; Chicago P. T. Co. v. Philadelphia P. T. Co. (C. C.), 118 Fed. 852. If the defendant Fox Typewriter Company, Limited, has no existence, and had none when suit was brought and no successor liable for its acts, I do not comprehend how it is in court, or how any service could have been obtained, and a proper course would have been a motion by the person served to set aside the service of the process.[1]

ATKINS v. THE DISINTEGRATING COMPANY.

Supreme Court of the United States. 1873.

85 U. S. (18 Wallace) 272, 21 L. Ed. 841.

MR. JUSTICE SWAYNE recapitulated the facts of the case and delivered the opinion of the court. * * *

The prohibition to bring a "civil suit" against an inhabitant of the United States in a district other than that whereof he is

[1] Only a portion of the opinion is reprinted.

Section 48 of the Judicial Code applies only to defendants who are inhabitants of some districts within the United States, and does not affect suits against aliens, which may be brought in any district where the defendant may be found. United Shoe M. Co. v. Duplessis Independent Shoe M. Co., 133 Fed. 930 (1904).

As to waiver of right to be sued in a particular district in actions for infringement of letters patent, see U. S. Consol. Seeded Raisin Co. v. Phoenix Raisin S. & P. Co., 124 Fed. 234 (1903).

As to the meaning of a "regular and established place of business," see L. E. Waterman Co. v. Parker Pen Co., 100 Fed. 544 (1900).

As to the district of which a corporation is an "inhabitant" under section 48 of the Judicial Code, see Weller v. Pennsylvania R. Co., 113 Fed. 502, 503 (1902).—Ed.

an inhabitant, or in which he shall be found, is the hinge of the controversy between these parties. The appellees maintain that a cause of admiralty jurisdiction is a "civil suit" within the meaning of this prohibition. The appellants maintain the contrary. Our views coincide with those of the appellants, and we will proceed to state succinctly the considerations which have brought us to this conclusion.

It may be admitted that an admiralty case is a civil suit in the general sense of that phrase. But that is not the question before us. It is whether that is the meaning of the phrase as used in this section. The intention of the lawmaker constitutes the law.[1] A thing may be within the letter of a statute and within its meaning, or within its meaning though not within its letter.[2] In cases admitting of doubt the intention of the lawmaker is to be sought in the entire context of the section—statutes or series of statutes in *pari materia*.[3]

The general language found in one place, may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment.[4]

The first paragraph of the eleventh section defines the jurisdiction of the Circuit Court as extending to "all suits of a civil nature, at common law or in equity, where," etc. The criminal jurisdiction of the Circuit Court is next defined. Then follows the provision that no one shall be arrested in one district for trial in another "in a civil action" before a Circuit or District Court, and next the prohibition here in question.

Construing this section, down to the second prohibition, inclusive, by its own light alone, we cannot doubt that by the phrase "civil suit," mentioned in this prohibition, is meant a suit within the category of "all suits of a civil nature at common law or in equity," with which the section deals at the outset. This view derives further support from the ninth, twenty-first, and twenty-second sections of the act. The ninth section gives to the District

1 United States v. Freeman, 3 Howard 563.

2 Slater v. Cave, 3 Ohio State 85; 7 Bacon's Abridgment, title Statutes, 1, 2, 3, 5.

3 Patterson v. Winn, 11 Wheaton 389; Dubois v. McLean, 4 McLean 489, 1 Cooley's Blackstone 59; Doe v. Brandling, 7 Barnewall & Cresswell 643; Stowel v. Zouch, 1 Plowden 365.

4 Brewer v. Blougher, 14 Peters 198, 199; Miller v. Salomons, 7 Exchequer, 546; same case in error, 8 Id. 778; Waugh v. Middleton, Ib. 356, 357.

Court its admiralty jurisdiction, its common-law jurisdiction, and its criminal jurisdiction. With reference to that first named, the language is "of all civil causes of admiralty and maritime jurisdiction." As to the second, it is "of all suits at common law," etc. The twenty-first section allows appeals from the District to the Circuit Court "in causes of admiralty and maritime jurisdiction where the matter in dispute exceeds the sum of three hundred dollars." The twenty-second section provides "that final decrees and judgments in civil actions," where the matter in dispute exceeds fifty dollars, may be reviewed in the Circuit Court upon error. The distinction is thus made between admiralty and other civil actions, and the terms "causes of admiralty and maritime jurisdiction," are applied to the former, and the phrases "civil actions" and "suits at common law" to the latter.

We think the conclusion is inevitable that the terms civil suit, in the eleventh, and civil actions, in the twenty-second section, were intended to mean the same thing. The meaning of the phrase employed in the latter admits of no doubt. The language there is "civil actions," and it is used to distinguish them from "causes of admiralty and maritime jurisdiction," provided for in the preceding section. The twenty-first and twenty-second sections are in *pari materia* with the eleventh, and throw back a strong light upon the question arising under the latter. We think it dispels all darkness and doubt if any could otherwise exist upon the subject.[5]

SMITH v. LYON.

Supreme Court of the United States. 1890.

133 U. S. 315, 10 S. Ct. 303, 33 L. Ed. 635.

This action was dismissed by the court below for want of jurisdiction, to which judgment the plaintiffs below sued out this writ of error. The case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court for the Eastern District of Missouri. It was dismissed in that court for want of juris-

[5] Only a portion of the opinion is reprinted.—Ed.

diction, and judgment rendered accordingly; to which this writ of error is prosecuted. 38 Fed. Rep. 53.

The facts out of which the controversy arises are found in the first few lines of plaintiffs' petition. In this they allege that they are partners doing business under the firm name of C. H. Smith & Co.; that the said C. H. Smith is a resident and citizen of St. Louis, in the State of Missouri, and Benjamin Fordyce is a resident and citizen of Hot Springs, in the State of Arkansas; and that the defendant O. T. Lyon is a resident and citizen of Sherman, in the State of Texas.

To this petition, which set out a cause of action otherwise sufficient, the defendant Lyon, who was served with the summons in the Eastern District of Missouri, filed a plea to the jurisdiction of the court appearing by attorney especially for that purpose, the ground of which is, that one of the plaintiffs, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the State of Arkansas, and the defendant was a resident and citizen of Sherman, in the State of Texas, and that the suit was not brought in the district of the residence of either the plaintiff Fordyce, or of the defendant.

The motion to dismiss for want of jurisdiction was sustained by the Circuit Court, and the soundness of that decision is the question which we are called upon to decide.

The decision of it depends upon the proper construction of the first section of the Act of Congress approved March 3, 1887, 24 Stat. 552, c. 373, as amended by the Act of August 13, 1888, 25 Stat. 433, c. 866. That statute professes to be an act to amend the Act of March 3, 1875, and its object is "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes." The first section of the act confers upon the Circuit Courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds the sum of $2,000, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different States, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the statute. This first clause of the act described the jurisdic-

tion common to all the Circuit Courts of the United States, as regards the subject matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in Circuit Courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several Circuit Courts of the United States with reference to its territorial limits, and this clause declares "that no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen. * * *

We do not think, in the light of this long-continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of Strawbridge v. Curtiss, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter. It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over

ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon by this court.

These considerations require the affirmance of the judgment of the Circuit Court, and it is so ordered.[1]

UNITED STATES v. STANDARD OIL CO.

Circuit Court, E. D. Missouri, E. D. 1907.

152 Fed. 290.

SANBORN, Circuit Judge.— * * * Section 4 of the Act of July 2, 1890, confers upon the several Circuit Courts of the United States jurisdiction to restrain violations of its provisions, and section 5 reads in this way:

"Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

The individual defendants, the Standard Oil Company of New Jersey, and nearly all the subsidiary corporations, except the Waters-Pierce Oil Company, were not inhabitants of, and could not be found in, this district. After the filing of the bill, and upon the presentation by the complainant of a petition which disclosed this fact, the court ordered that the non-resident defendants should be brought in, and that subpoenas should be served upon them in the districts in which they resided. Certain of these defendants have appeared specially, and moved the court to vacate this order and to quash the service of the subpoenas upon them, upon the grounds that the court was without jurisdiction to make the order,

[1] Only a portion of the opinion is reprinted.

Compare Carpenter v. Talbot, 33 Fed. 537, 538 (1888); Rawitzer v. Wyatt, 40 Fed. 609 (1889).

As to who may object to the fact that there is an improper joinder of the parties, see Smith v. Atchison, T. & S. F. R. Co., 64 Fed. 1, 2 (1894).—Ed.

that it was prematurely and irregularly made, and that the ends of justice did not require that the non-resident defendants should be brought into this suit.

The judicial power of the United States is vested by the Constitution in the Supreme Court, "and in such inferior courts as the Congress may from time to time ordain and establish." This power extends "to all cases in law an equity arising under this Constitution and the laws of the United States,—to controversies to which the United States shall be a party," and to other cases not material to the issues here presented. Article 3, §§ 1, 2. This is a case in equity arising under a law of the United States. The United States is a party to the controversy which it involves; and the Congress had ample authority, under these provisions of the Constitution, to confer upon this or upon any inferior court of the nation jurisdiction of this suit and power to summon the proper parties to it, wherever residing or found within the dominion of the nation, to a hearing and decree herein. U. S. v. Union Pac. R. Co., 98 U. S. 569, 604, 25 L. Ed. 143. As the Congress had the authority to enact that in this, and other cases of this class, any Circuit Court in which the United States might bring its suit might, by process served anywhere in the United States, lawfully bring into it all the parties necessary to the adjudication of the controversies it involved, they had authority to empower such a court to bring in these parties whenever in its opinion the ends of justice should require such action, because the whole is greater than any of its parts and includes them all.

The inhibition of section 1 of the Judiciary Acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), that "no civil suit shall be brought before either of said courts (the Circuit and District Courts) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not restrict the jurisdiction of this court, nor its power to bring in parties without its district, in the case under consideration, because that provision is inapplicable to instances in which exclusive jurisdiction over particular cases, or classes of cases, is created and conferred upon the courts of the United States by special Acts of Congress. U. S. v. Mooney, 115 U. S. 106, 6 Sup. Ct. 304, 29 L. Ed. 550; Van Patten v. Chicago, Milwaukee & St. Paul R. Co. (C. C.), 74 Fed. 981, 985-988; Atkins v. Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; In re Louisville Underwriters, 134 U. S. 488, 493, 10 Sup. Ct. 587, 33 L. Ed. 991; In re Hohorst, 150 U. S.

653, 662, 14 Sup. Ct. 221, 37 L. Ed. 1211. There can therefore be no doubt that Congress had the authority to confer jurisdiction of this case upon this court, nor that they have lawfully exercised that authority; and the only question is whether or not this court exceeded the power thus conferred upon it when it summoned the non-resident defendants.[1]

In re HOHORST.

Supreme Court of the United States. 1893.

150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court. * * *

By the Act of March 3, 1887, c. 373, § 1, as corrected by the Act of August 13, 1888, c. 866, "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States," "or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects." 25 Stat. 552; 25 Stat. 434. * * *

The question then arises how far the jurisdiction thus conferred over this last class of controversies, and especially over a suit by a citizen of a State against a foreign citizen or subject, is affected by the subsequent provisions of the same section, by which, after other regulations of the jurisdiction of the Circuit Courts and District Courts of the United States, it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than

1 Only a portion of the opinion is reprinted.
See also, Wogan Bros. v. American Sugar Refining Co., 215 Fed. 273 (1914).—Ed.

that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Of these two provisions, the latter relates only to suits between citizens of different States of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these States against an alien. And the former of the two provisions cannot reasonably be construed to apply to such a suit.

The words of that provision, as it now stands upon the statute book, are that "no civil suit shall be brought before either of said courts against any person by an original process or proceeding in any other district than that whereof he is an inhabitant." These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as whole.[1]

GALVESTON, Etc., RAILWAY v. GONZALES.

Supreme Court of the United States. 1894.

151 U. S. 496, 14 S. Ct. 401, 38 L. Ed. 248.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

[1] Only a portion of the opinion is reprinted.
In Hill v. Great Northern Ry. Co., 197 Fed. 488 (1912), Bourquin, District Judge, said:
"(1) While aliens are not within that provision of the statutes which prohibits bringing suit in any Federal Court save that in the district whereof defendant is an inhabitant, so far as suits against aliens are concerned, they are within it so far as suits by aliens are concerned. That is, an alien may be sued wherever valid service of process may be made on him, but he can sue a citizen only in the district whereof the latter is an inhabitant."—Ed.

This case raises the question whether a railway company, incorporated under the laws of a certain State, and having its principal offices within one district of such State, can be said to be an inhabitant of another district of the same State, through which it operates its line of road and in which it maintains freight and ticket offices and depots.

By section 1 of the Act of August 13, 1888, c. 866, 25 Stat. 433, revising the jurisdiction of the Circuit courts, it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant"; and by Rev. Stat. § 740, "when a State contains more than one district, every suit not of a local nature, in the Circuit or District courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides." The above provision of the Act of 1888 is manifestly a restriction upon the jurisdiction conferred by the Act of March 3, 1875, c. 137, 18 Stat. 470, which contained a similar provision, but with the additional privilege of bringing such suit within any district "in which he," the defendant, "shall be found at the tme of serving such process or commencing such proceedings."

It will be noticed that in this as well as in prior acts regulating the jurisdiction of the Circuit courts, a distinction is made between citizens of States and inhabitants of districts. This distinction has been carefuly observed in all the principal adjudications upon the construction of these statutes, and, for the purpose of determining the habitancy of a railway corporation, it is pertinent to refer to some of these cases. In one of the earliest, viz., Picquet v. Swan, 5 Mason 35, 46, a suit was begun by trustee process or writ of garnishment sued out by an alien against a defendant, described as now commorant of the City of Paris in the Kingdom of France, of the City of Boston in the Commonwealth of Massachusetts, one of the United States of America, and a citizen of the said United States. "The process was served by the attachment of a lot of land in Boston belonging to the defendant, and by summoning his agent to appear and show cause. The defendant never appeared as a party to the suit; and it was contended that the plaintiff was entitled to consider him in default, and to have judgment. It was held, however, by Mr. Justice STORY,

that where a party defendant was a citizen of the United States, but resident in a foreign country, having no inhabitancy in any State of the Union, the Circuit courts had no jurisdiction over him in a suit brought by an alien, though his property were attached in the district. The case involved the construction of that clause of the eleventh section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 78, which provided that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It will be noticed that the words used are "inhabitant of the United States," not "inhabitant of a district," and, in speaking of these words, Mr. Justice STORY said: "I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties." That he meant the word "inhabitant" as "inhabitant of the United States" is evident from what follows: "A person might be an inhabitant, without being a citizen; and a citizen might not be an inhabitant, though he retain his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi,* quite another. I read, then, the clause, thus: 'No civil suit shall be brought before either of said courts against an alien or a citizen, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.' It cannot be presumed that Congress meant to say, that if an alien or a citizen were not an inhabitant of, or commorant in, the United States, a suit might be maintained against him in any district, and process served abroad upon him, or judgment given against him without notice or process served upon him." There is nothing here which indicates that Mr. Justice STORY confounded citizenship of a State with inhabitancy of a district.

In Shaw v. Quincy Mining Company, 145 U. S. 444, a citizen of Massachusetts sought to maintain a bill in equity in the Circuit Court for the Southern District of New York against the Quincy Mining Company, a corporation organized under the laws of Michigan, and having a usual place of business in the City of New York, and the question arose whether the court had jurisdiction over such a suit. It was held that it did not. In the opinion of the court it was said that the word "inhabitant" in the Act of 1789 was apparently used, not in any larger meaning than "citizen,"

but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State.

In construing the Acts of 1887 and 1888 it was held that they could not be considered as giving jurisdiction to a Circuit Court held in a State of which neither party was a citizen, and that "in the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the State and district in which it has been incorporated, or in the State of which the other party is a citizen." It was further held that the domicil, the home, the habitat, the residence, the citizenship of a corporation, could only be in the State by which it was created, although it might do business in other States whose laws permitted it; and it was finally decided that under these acts of Congress "a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State." * * *

An individual is almost universally held to be an inhabitant of the place in which he dwells, and though he do business for a long time in another place, he will not be regarded as changing his domicil so long as the *animus revertendi* continues. Thus in Jopp v. Wood, 34 Beavan 88; S. C. 4 De G., J. & S. 616, it was held that a Scotchman engaged in business in India for twenty-five years did not thereby change his domicil. And in In re Capdevielle, 2 H. & C. 985, it was similarly held with regard to a Frenchman who had resided and engaged in business in England for twenty-nine years. In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to,[1] that if the corporation be created by the laws of a State in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done. * * *

There are doubtless reasons of convenience for saying that a

[1] The discussion of these cases is omitted, only a portion of the opinion being reprinted.—Ed.

corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several States generally provide; but the law contemplates that every person or corporation shall have but one domicil, and in the case of the latter, it shall be in that State by whose laws it was created, and in that district where its general offices are located.[2]

THE CORTES CO. v. THANNHAUSER.

Circuit Court, S. D. New York. 1881.

9 Fed. 226.

Blatchford, C. J.—The defendants in these suits have brought two suits at law in this court against the Cortes Company and one suit at law in this court against Lucius E. Chittenden and others to recover sums of money alleged to be due. The above are suits in equity. The first of them is brought to restrain the prosecution of all three of the suits at law, and the second to restrain the prosecution of the suit at law against Chittenden and others. Properly interpreted, there is no prayer in either of the two bills for any relief except injunctions to stay the prosecution of the suits at law. The ground stated for such relief is that there is, on the facts alleged in the bills, and which are alleged in the same terms in both bills, an equitable defense to all of the suits at law, which, if established as alleged, would warrant a perpetual stay of the suits, but that such defense cannot be availed of in the suits at law, by reason of the distinction maintained in the jurisdiction of the United States between proceedings at law and proceedings in equity, as shown by the ruling in Montejo v. Owen, 14 Blatchf. 324, and in the cases there cited.

The plaintiffs, on filing the bills, and on notice to the attorney for the plaintiffs in the suits at law, now move for an order that service of the subpoena to appear and answer in these suits, or such other notices as the court shall adjudge proper, with a view to enable the court to proceed with these suits, upon said attorneys, be deemed sufficient and proper service upon the said plaintiffs as defendants in these suits, they being either foreigners or

2 But see Riddle v. New York L. E. & W. R. Co., 39 Fed. 290 (1889); United States v. Southern Pac. R. Co., 49 Fed. 297, 300-301 (1892); Shainwald v. Davids, 69 Fed. 704 (1895).—Ed.

citizens of California and residents of San Francisco, in California.

It is a well settled principle that a bill filed on the equity side of a court, to restrain or regulate a judgment or a suit at law in the same court, is not an original suit, but ancillary and dependent, and supplementary merely to the original suit; and that such a bill can be maintained in a Federal Court without reference to the citizenship or the residence of the parties. Logan v. Patrick, 5 Cranch 288; Dunn v. Clarke, 8 Pet. 1; Clarke v. Mathewson, 12 Pet. 164; Freeman v. Howe, 24 How. 450, 460.[1]

MEXICAN ORE CO. v. MEXICAN GUADALUPE MINING CO.

Circuit Court, D. New Jersey. 1891.

47 Fed. 351.

Plaintiff, who was a resident of Missouri, brought an action in the United States Circuit Court of New Jersey for specific performance of defendant corporation's contract to sell certain smelting ores to him, and judgment was rendered as prayed therein, and defendant was enjoined from disposing of the ores to any other persons, and from interfering in any manner with the product of the mines. Defendant disregarded the order, and its officers and directors were adjudged guilty as of a contempt. Afterwards a supplemental bill was filed, alleging that one of the directors, William M. Cayton, a resident of Pennsylvania, who was not a party to the original bill, although he was one of those adjudged in contempt, had commenced legal proceedings in a foreign State, where the mines were located, to enforce the collection of a debt due him from the corporation, and had procured the appointment of a receiver and an order of sale in satisfaction of the debt, and that such proceedings were instituted to evade the decree for specific performance of the contract previously rendered.[2] * * *

1 Only a portion of the opinion is reprinted.

For a comprehensive list of cases illustrating ancillary jurisdiction, see 1 Foster Federal Practice (5th Ed.), 142-150.—Ed.

2 The facts are restated, as given in the syllabus, and only a portion of the opinion is reprinted.—Ed.

Green, J.— * * * The Act of Congress of March 3, 1887, as amended by the Act of August 13, 1888, touching the jurisdiction of this court, makes the following provision:

"No person shall be arrested in one district for trial in another in any civil action before the Circuit or District Court, and no civil suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It seems clear upon the mere reading of this act that this court can have no jurisdiction of a suit commenced by a citizen of Missouri against a citizen of Pennsylvania. The sole ground of jurisdiction in this case is that the suit is between citizens of different States. The law is imperative that in such case the suit must be brought either in that district in which the plaintiff resides or in that district in which the defendant resides. That condition is not complied with, admittedly, in this cause.

The complainant, to relieve itself of this embarrassing position, asserts that its supplemental bill, now filed, is ancillary to the original bill heretofore filed in this court by the party complainant, and that it is a well settled principle that the court will retain jurisdiction of the cause under such circumstances, although the parties that may be brought in by the ancillary bill are citizens of the same district as the complainant. It is undoubtedly true that where the Circuit Court of the United States had acquired jurisdiction of the parties and of the subject-matter of a suit, and ancillary proceedings are instituted, the court will retain the jurisdiction, although the parties upon the different sides of the controversy are citizens of the same State; but I think that such principle cannot be invoked in this case, to enable the complainant to maintain this bill. This supplemental bill introduces new parties, and an entirely new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the original bill. That bill was to compel the specific performance of a contract. That contract was for the supplying to the complainant certain ores, after undergoing a process of manipulation and concentration. To carry out such contract, it is apparent that it is not an absolute prerequisite that these very mines should be in the possession of the defendants. With or without them, the defendants rest under the obligation of their contract, and may

be decreed to perform it literally. But the action of Clayton, so deprecated and condemned by the complainant, affects the mere actual possessions of the mines only. It does not deprive the defendants of their ability to perform their contract. What possible connection, then, can the matter set up in the supplemental bill have with the object of the original bill? How can it be held to be necessary to decide whether or not Clayton is a bona fide creditor of the defendant corporations, and, as such, has or has not a right to collect his debts due from them by a suit, in order to decree a specific performance of a contract to which individually he was not a party, nor in which was he, as an individual, at all interested, nor which can be affected in any wise by his action? In Cross v. De Valle, 1 Wall. 14, it was held that a cross-bill filed in that cause on behalf of parties made defendants in the original bill against Cross was an original bill in its nature, in that it introduced an entirely new controversy, not necessary to be decided in order to have a final decree on the case presented by the original bill; and being, therefore, in the nature of an original bill, such cross-bill could not be sustained against Cross, the defendant, he being neither a citizen nor a resident of the jurisdiction in which the bill was filed. This case is very similar to the one before the court. I think that the proper description of this supplemental bill is that it is an original bill, so far as Clayton is concerned.

If, then, this bill, although called an "ancillary bill," is in its nature an original bill, so far as Clayton is concerned it is evident that this court is wholly without jurisdiction, and no order such as prayed for, nor any other order, could be, by it, made in the cause.

COUND v. ATCHISON, T. & S. F. RY. CO.

Circuit Court, W. D. Texas, El Paso Division. 1909.

173 Fed. 527.

MAXEY, District Judge (after stating the facts).—As disclosed in the statement of the case, this suit was brought by the plaintiff to recover damages of the defendant, in excess of $2,000, for injuries which he received during the month of March, 1909, in the territory of New Mexico, while discharging his usual duties as brakeman on one of the defendant's freight trains. The plaintiff

is a citizen of Texas, and resides within the Western District of the State; and the defendant is a common carrier incorporated and organized under the laws of the State of Kansas, and operated a line of railway from El Paso, Tex., through New Mexico, and into the State of its incorporation. It maintains a general office, where its records are kept, in the city of Topeka, Kan. The sole question submitted for decision is whether this court has jurisdiction, over the protest of the defendant, to hear and determine the cause. On the one hand, it is insisted by the plaintiff that the jurisdiction obtains since diverse citizenship exists and the suit was brought in the district of his residence, where due service was had upon an authorized agent of the defendant. Upon the other, the defendant contends that the suit should be brought in the district of which it is an inhabitant, to wit, the district of Kansas, because the jurisdiction claimed is not founded only on the fact that the suit is between citizens of different States, but that it is based upon the additional ground that the suit is one arising under a law of the United States.

Which of these divergent views is correct? To answer the question satisfactorily it becomes necessary to ascertain (1) whether the suit arises under a law of the United States; and (2) whether, if so arising, it was brought in the proper district.[1] * * *

Attention will not be directed to the second query above propounded. Was the present suit brought in the proper district? The general jurisdiction of the court is not here involved, but the question has reference merely to the place of suability; and in this connection it may not be amiss to add that the record does not present any question of waiver, on the part of the defendant, of its right or privilege of being sued in the district of which it is an inhabitant. In the first pleading filed by the defendant, a protest is entered against the court's jurisdiction, and it is insisted that the suit should be brought in the district of Kansas. In the examination of this question no aid is derived from the Employer's Liability Act, and recourse must be had to the Act of March 3, 1887, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). The applicable part of the first section of the act reads as follows:

"That the Circuit Court of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the

[1] Only that part of the opinion dealing with the second question is reprinted.—Ed.

matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Repeating the language of the statute:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

That, for jurisdictional purposes, a railway corporation is a person and inhabitant of the State under the laws of which it is incorporated, has been so definitely and conclusively settled by the Supreme Court that a reference to authorities in support of the proposition is deemed altogether useless. Referring to the statute, and eliminating the Federal feature of the present case, the jurisdiction of the court would be clear beyond controversy, since in that case the jurisdiction would be founded only on the fact of diverse citizenship. But here there appear two sources of jurisdiction, the one founded on diverse citizenship and the other upon the fact that the suit arises under a law of the United States.

In the former case, the statute authorizes suit to be brought in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only the fact that the action is between citizens of different States; while, in the latter, suit must be brought in the district of which the defendant is an inhabitant. While the two sources of jurisdiction are combined in one suit, can it be said that the jurisdiction is founded only on the fact that the action is between citizens of different States? If the language of the statute be given its plain and ordinary meaning, the question propounded must unquestionably be answered in the negative, since the jurisdiction cannot be founded only—that is, using the definition of Webster (Web. Dict. p. 913), "utterly, entirely, wholly"—on one ground, when another and equally important constitutional ground is present in the same suit. In cases of this kind, therefore, the suit should be brought in the district of which the defendant is an inhabitant.

The court recognizes the importance of the question under discussion, and has given it careful consideration. Its decision is based upon the languages of the statute; but it is thought that the conclusion announced is clearly supported by the case of In re Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402. If the court has correctly construed the law, the competent authority may readily make any amendment which may be deemed wise and proper. On the other hand, if the construction of the statute, applied by the court, be erroneous, the error may be easily corrected by the appellate tribunals.

For the reasons assigned, the plea to the jurisdiction should be sustained, and the suit dismissed for the want of jurisdiction; and it is so ordered.

CAMP v. BONSAL.

Circuit Court of Appeals, Fourth Circuit. 1913.

203 Fed. 913, 122 C. C. A. 207.

ROSE, District Judge.— * * * (1) This suit is a controversy between citizens of different States. It is therefore one to which the judicial power of the United States may extend. The particular court in which the case was brought was created by

statute, and may not exercise any jurisdiction except that which the statute gives it. The Act of Congress provides that when the jurisdiction is founded, as it is here, solely on the fact that the action is between citizens of different States, the suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Neither the buyer nor Brewer was a resident of the Eastern District of North Carolina. It is true that this provision confers a privilege upon the defendant. He may waive it if he chooses. If the controversy is one between citizens of different States, he may consent to be sued in any district. Brewer, however, has never waived his objection to being sued in the Eastern District of North Carolina.[1]

LIVINGSTON v. JEFFERSON.

Circuit Court, D. Virginia. 1811.

15 Fed. Cas. No. 8411, p. 660, 1 Brockenbrough. 203.

MARSHALL, Circuit Justice.—The sole question now to be decided is this—Can this court take cognizance of a trespass committed on lands lying within the United States, and without the district of Virginia, in a case where the trespasser is a resident of, and is found within the district? I concur with my brother judge in the opinion that it cannot. I regret that the inconvenience to which delay might expose at least one of the parties, to-

[1] Only a portion of the opinion is reprinted.

The following are a few of the numerous cases in which it has been held that there was a waiver of one's right to be sued in a particular court: Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 369, 28 S. Ct. 720, 720, 52 L. Ed. 1101, 1102 (1908) appeared and pleaded to the merits; Lebensberger v. Scofield, 139 Fed. 380, 384-385, 71 C. C. A. 476, 480-481 (1905) joined defenses to merits with defenses to claim that service was invalid; Baldwin v. Pacific Power & Light Co., 199 Fed. 291 (1912) defendant filed petition for removal and plaintiff filed amended complaint in Federal Court and signed stipulation giving defendant time to plead thereto.

But see Pacific Mut. Life Ins. Co. v. Tompkins, 101 Fed. 539, 541, 41 C. C. A. 488, 490 (1900) attended taking of depositions before issues were made up, and filed no plea in abatement; Chesapeake & O. C. A. Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942, 944 (1902) demurrer to bill; Stonega Coal & Coke Co. v. Louisville & N. R. Co., 139 Fed. 271 (1905) appeared at time depositions were taken and witness was cross-examined, and made stipulations at time of taking of depositions; Hagstoz v. Mutual Life Ins. Co. of New York, 179 Fed. 569, 571 (1910) foreign corporation appointed registered agent on whom summons might be served.—Ed.

gether with the situation of the court, prevent me from bestowing on this question that deliberate consideration which the very able discussion it has received from the bar would seem to require—but I have purposely avoided any investigation of the subject previous to the argument, and must now be content with a brief statement of the opinion I have formed, and a sketch of the course of reasoning which has led to it. The doctrine of actions local and transitory has been traced up to its origin in the common law—and, as has been truly stated on both sides, it appears that originally all actions were local. That is, that according to the principles of the common law, every fact must be tried by a jury of the vicinage. The plain consequence of this principle is, that those courts only could take jurisdiction of a case, who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts therefore necessarily becomes local with respect to every species of action. But the Superior Courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surrey or Middlesex, the necessity of averring in the declaration, that the cause of action arose in either county, could not be produced in order to give the court jurisdiction, but to furnish a venire. For the purpose of jurisdiction, it would unquestionably be sufficient, to aver that the transaction took place within the realm. This, however, being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification—and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue; and where the contract exhibits on its face, evidence of the place where it was made, the party is at liberty to aver that such place lies in any county in England. This is known to be a fiction. Like an ejectment, it is the creature of the court, and is moulded to the purposes of justice, according to the view which its inventors have taken of its capacity to effect those purposes. It is however, of undeniable extent. It has not absolutely prostrated all distinction of place, but has certain limits prescribed to it, founded in reasoning satisfactory to those who have gradually fixed these limits. It may well be doubted, whether at this

day, they are to be changed by a judge not perfectly satisfied with their extent. This fiction is so far protected by its inventors, that the averment is not traversable for the purpose of defeating an action it was invented to sustain; but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

In the case at bar, it is traversed for that purpose, and the question is, whether this be a case in which such traverse is sustainable; or, in other words, whether courts have so far extended their fiction as, by its aid, to take cognizance of trespasses on lands not laying within those limits which bound their process. They have, without legislative aid, applied this fiction to all personal torts, and to all contracts wherever executed. To this general rule, contracts respecting lands form no exception. It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found; yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause: yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court. That this consideration should lose its influence, where the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it.

The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local. If this distinction be established; if judges have determined to carry their innovation on the old rule, no further; if, for a long course of time, under circumstances which have not changed, they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this

limit. This distinction has been repeatedly taken in the books, and recognized by the best elementary writers, especially Judge Blackstone, from whose authority no man will lightly dissent. 3 Bl. Comm. 294. See also Mr. Chitty's note (4) in his edition of Blackstone (volume 2, 233). He expressly classes an action for a trespass on lands with those actions which demand their possession, and which are local, and makes only those actions transitory, which are brought on occurrences that might happen in any place. From the cases which support this distinction, no exception, I believe, is to be found among those that have been decided in court, on solemn argument. One of the greatest judges who ever sat on any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction, between taking jurisdiction in cases of contract respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of Mostyn v. Fabrigas, 1 Cowp. 166, Lord Mansfield states the true distinction between proceedings which are *in rem,* in which the effect of a judgment cannot be had, unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local. It may be termed an *obiter dictum.* He recites in that opinion, two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic majesty; but both those decisions were at *nisi prius.* And though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the court. In a subsequent case,—(Doulson v. Matthews (1792) 4 Durn. & E., 4 Term R. 503),—these decisions are expressly referred to and overruled, and the old distinction is affirmed.

It has been said that the decisions of British courts, made since the Revolution, are not authority in this country. I admit it—but they are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide. Had the regular course of decisions previous to the Revolution, been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event,

this court might have felt itself bound to disregard them; but where the ancient date has been long preserved, and a modern attempt to overrule it, has itself been overruled since the Revolution, I consider the last adjudication in no other light than as the true declaration of the ancient rule.

According to the common law of England then, the distinction taken by the defendant's counsel, between actions local and transitory, is the true distinction, and an action of *quare clausum fregit,* is a local action. This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connections with the parent State, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority. But it has been said, that this rule of the common law is impliedly changed by the Act of Assembly, which directs that a jury shall be summoned from the bystanders. Were I to discuss the effect of this act in the courts of the State, the inquiry, whether the fiction already noticed was not equivalent to it in giving jurisdiction, would present itself. There are also other regulations, as, that the jurors should be citizens, which would deserve to be taken into view. But I pass over these considerations, because I am decidedly of opinion, that the jurisdiction of the Courts of the United States depends, exclusively, on the Constitution and laws of the United States.

In considering the jurisdiction of the Circuit courts, as defined in the Judicial Act (1 Stat. 73), and in the Constitution which that act carries into execution, it is worthy of observation, that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed in order to give it the right to try the cause, and consequently the same defect of justice might occur.

Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction, which produces the inconvenience of a clear right without a remedy. I must submit to it. The law upon the demurrer is in favor of the defendant.[1]

In United States v. Sutherland, 214 Fed. 320 (1914) it was held that the provision of Judicial Code (Act March 3, 1911, c. 231, § 53, 36 Stat. 1101 U. S. Comp. St. Supp. 1911, p. 1501), that, "when a judicial district contains more than one division * * * all prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district," applies only to districts having statutory divisions; and in a district having no such divisions, but which, on account of there being different places fixed for holding court, the court has by rule divided into so-called divisions for convenience in drawing juries, etc., the court has discretionary power to transfer a criminal cause from one place of holding court to another without the consent of the defendant.[2]

JONES v. GOULD.

Circuit Court, S. D. Ohio, E. D. 1905.

141 Fed. 698.

In Equity. On motion to quash service.

RICHARDS, Circuit Judge (orally).—This case is submitted to me upon a motion to quash the service of a restraining order made upon the defendants, Gould, Ramsey, Guy and Blair. I had ex-

1 An opinion to the same effect by Tyler, District Judge, is omitted.
For other cases in which it was held the action was local in its nature, see East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. 608, 616-617 (1892) appointment of receiver to be put in charge of property; Seybert v. Shamokin & Mt. C. Electric Ry. Co., 110 Fed. 810 (1901) foreclosure of mortgage; Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 8-9, 114 C. C. A. 21, 28-29 (1912) enforcement of lien; Kentucky Coal Lands Co. v. Mineral Development Co., 219 Fed. 45, 46-47, 133 C. C. A. 151, 152-153 (1914) ejectment.—Ed.

2 The syllabus of the case is reprinted.—Ed.

pected to put in writing my conclusions, but an examination of the authorities has occupied the limited time at my disposal and precluded this. I may hereafter prepare a short opinion. At present I shall content myself with stating the general results reached.

Upon the filing of the bill, I set the case for hearing upon the motion to appoint a receiver, and upon application of the complainant restrained the defendants, until the further order of the court, from selling, contracting to sell, transferring, or parting with the possession of any of the properties of the Little Kanawha Syndicate, so called, as described in the bill. I also directed that notice of this order, with a copy of the bill, be served personally upon the said defendants. Service of this order was made, and the defendants, making a special appearance for the purpose, have filed motions to quash the service, made outside of this State and district, on the ground that in each instance (1) the defendant is an inhabitant and citizen of some State other than Ohio; (2) it appears upon the face of the bill that the relief sought is of such nature that the defendant cannot lawfully be called upon to defend against the same in this district; and (3) the court is without jurisdiction to proceed against the defendant. * * *

Proceeding to a consideration of the merits of the motion: While the first section of Act March 3, 1875, c. 137, 18 Stat. 470, as amended in 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district that whereof he is an inhabitant, but where the jurisdiction is founded only upon the fact that the action is between citizens of different States, suit shall be brought only within the district of the residence of either the plaintiff or defendant," and while clearly the institution of this suit is not in compliance with these provisions, for neither the plaintiff nor any of the defendants are residents of this district, it is contended that jurisdiction may be sustained, and all the defendants ultimately be brought in, under section 8 of the same act (18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), which provides "that when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien, or claim to, or to remove any incumbrance or lien or cloud upon the title of real or personal property within the district where such suit is brought, one or more of the defendants therein shall not

be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order" directing special service by publication or otherwise.

The contention of the plaintiff, briefly stated, is that this is a suit to enforce a trust in certain property, real or personal, which was purchased in part with moneys subscribed by him, and is now held by the syndicate managers, Gould, Ramsey & Guy, upon certain trusts defined in what is known as the syndicate agreement; that a part of this property, namely, the stock of two railroad companies organized in Ohio, has a *situs* within this district, and because of this fact, the suit may be regarded as one to enforce a legal or equitable claim to such property, of which the court has jurisdiction under section 8, with authority to being the nonresident defendants in by publication.

I am satisfied from the authorities cited that the stock referred to has its *situs* within this district. These Ohio railroad corporations are inhabitants, citizens of Ohio, and their stocks have their *situs* here. Jellenik v. Huron Copper Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

But, as I sufficiently indicated during the course of the argument, the serious question, it seems to me, is whether this is a suit "to enforce a legal or equitable lien upon or claim to" this railroad stock, which is the only property within the district. Of course, the general rule is well known that the authority of a court is limited to persons and property within its territorial jurisdiction. Where an action is in *personam,* the defendant must be served or his appearance secured; if *in rem,* judgment only operates upon the property within the district. Upon examination of such authorities as I have been able to make and a consideration of the phraseology of the section, I have reached the conclusion that to come within its intent and meaning, the suit must really be one *in rem,* directed primarily against specific property for the purpose of enforcing a legal or equitable lien upon or claim to such property, or of removing an incumbrance, or lien, or cloud upon the title to such property. All the cases cited have been cases of this kind, cases strictly *in rem,* and I have not found one in which jurisdiction is sustained under section 8, that was not directed primarily against property located within the district.

There are several cases where the court has refused to take jurisdiction of an action to subject the property of the defendant ultimately to the payment of his debts, although part of the prop-

erty was within the district. Thus in the case of Shainwald v. Lewis (D. C.) 5 Fed. 510, Judge HILLYER said respecting section 738 (page 516):

"In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words 'legal or equitable lien or claim against real or personal property,' Congress intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity."

And in Dormitzer v. Illinois, etc., Bridge Co. (C. C.) 6 Fed. 217, Judge LOWELL declined to entertain jurisdiction of a suit to attach the property of a non-resident defendant, saying (page 218):

"A recent statute gives these courts jurisdiction to enforce a lien upon or claim to, or remove an encumbrance, or lien, or cloud upon the title to, real or personal property within the district, though the defendants or some of them, may not be either inhabitants thereof or found therein, first giving notice to the absent defendants. But this means a lien or title existing anterior to the suit, and not one caused by the institution of suit thereof."

I have not been able to find that these cases have been qualified or overruled.

This suit might indirectly and ultimately affect property in Ohio, but not necessarily. The plaintiff, as a syndicate subscriber, has no lien on, or claim to this property. He did subscribe certain money, some $70,000, to the syndicate fund. This fund was placed absolutely in the possession and control of the syndicate managers; the title passed to them; they were to purchase with it certain coal and railroad properties, which were to be connected by lines to be constructed by the syndicate, and after this was done, the properties were either to be sold and the profits, if there were any, divided among the subscribers, or the property was to be capitalized and the stock distributed among the subscribers. The managers were to receive for their services a certain percent, of the funds subscribed. The fullest discretion was vested in them, both as to the time of existence of the syndicate, and their conduct under the agreement. This subscriber brings this suit not because

he is a creditor of the syndicate managers, not because he has a claim against them, and thus, in a certain sense, a claim against the syndicate property, but because he contributed to the fund in their possession and control. He has no title to or interest in the fund. He may have an ultimate interest in the profits of the deal, if it turns out ultimately that there are any. What he wants now is to control the syndicate managers, or have the court control them. This appears from the wording of the temporary restraining order. He wants the court to appoint a receiver to take over the syndicate property, and administer it, and call upon the syndicate managers to account for what they have done.

Now, this does not seem to me so much a suit against the property, because of some lien or claim to it, as a suit against the syndicate managers, because they are not doing their duty under the syndicate agreement. It appears to me that it is the syndicate managers, and not the syndicate property, that the plaintiff is after. I think it would be manifestly unjust and unfair not only to the managers themselves who have direct interests under the syndicate agreement, but to the 69/70 of the subscribers to the fund who are not represented here, for the court to take jurisdiction and assume to grant the relief asked for in the absence and without the appearance of the syndicate managers. In my opinion, they are necessary and indispensable parties, and as they have not been brought in, and can not be brought in, I think the case is one of which I ought not further entertain jurisdiction.

I sustain the motion to quash service and upon my own motion proceeding to pass upon questions of jurisdiction, I abrogate the temporary restraining order, decline to appoint a receiver, and dismiss the suit for want of jurisdiction.[1]

[1] Only a portion of the opinion is reprinted.

In the following cases it was held that their purpose was to enforce a "legal or equitable lien upon or claim to, or to remove" an "encumbranee or lien or cloud upon the title to real or personal property." Citizens' Sav. & Tr. Co. v. Illinois Cent. R. R., 205 U. S. 46, 27 S. Ct. 425, 51 L. Ed. 703 (1907) eancellation of deed and leases; De Hierapolis v. Lawrence, 99 Fed. 321 (1899) establishment as judgment as lien.

But see, contra, Ladew v. Tennessee Copper Co., 218 U. S. 357, 366-368, 31 S. Ct. 81, 83-84, 54 L. Ed. 1069, 1072-1073 (1910) abatement of nuisance; Nelson v. Husted, 182 Fed. 921, 922-923 (1910) specific enforcement of contract; Bank of Commeree & Trust v. MeArthur, 248 Fed. 138 (1918) setting aside of transfer of personalty by debtor and having said property declared debtor's and subjected to the payment of his debts.

For the meaning of the word "found," see 2 Words and Phrases (2nd Series) 564.—Ed.

In re TYLER.

Supreme Court of the United States. 1893.

149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court. * * *

No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment thereof. Wiswall v. Sampson, 14 How. 52; Taylor v. Carryl, 20 How. 583; Davis v. Gray, 16 Wall. 203; Krippendorf v. Hyde, 110 U. S. 276; Barton v. Barbour, 104 U. S. 126; Gumbel v. Pitkin, 124 U. S. 131. * * *

The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face.

The acceptance of the rule has been general, and but few decisions were cited on the argument in illustration of its application.[1]

FARMERS' LOAN & TRUST CO. v. IOWA WATER CO.

Circuit Court, S. D. Iowa, E. D. 1897.

80 Fed. 467.

THAYER, Circuit Judge.—This is a motion to vacate an order of reference, made by the district judge for the Southern District

[1] Only a portion of the opinion is reprinted.—Ed.

of Iowa, to a special master on April 14, 1896; also to vacate a report of the master made and filed on November 7, 1896, and a final decree entered on said report on February 19, 1897. The term of court at which said decree was entered expired on April 12, 1897, and the motion to vacate the above orders and decree, and to clear the record, was not made and filed until April 21, 1897. The ground of the motion is that, because the district judge by whom the order of reference was made and the special master by him appointed married sisters, the order of reference was made in violation of the provision of section 7 of the Act of August 13, 1888 (25 Stat. 433, 437, c. 866), and that the master's report in pursuance of said order of reference, and all subsequent proceedings taken thereunder, including the final decree, were and are utterly void. * * *

Another consideration bearing upon the subject in hand must also be kept in mind. The statute above cited is as follows:

"No person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin, shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which said justice or judge may be a member."

It is obvious from an inspection of the foregoing statute that, in its relation to the case in hand, it presents the question whether two men who happen to marry sisters are so related "by affinity or consanguinity" that the one, if he happens to be a Federal judge, may not appoint the other as a master to hear and report upon an isolated case. Without expressing a definite opinion upon this question, it is to be observed that it is by no means certain that the statute has any application to the case at bar. Counsel have termed the relationship between the district judge and the special master as that of brother-in-law, because they married sisters, but this is not correct, since the term of "brother-in-law" is thus defined: "The brother of one's husband or wife; also one's sister's husband." Cent. Dict.; Webst. Dict. The phrase "related by consanguinity" means related by blood, a relation which did not exist in the present case; while the phrase "related by affinity" is the relationship which is contracted by marriage between the husband and the blood relations of the wife or between the wife and the blood relations of the husband. Whart. Law. Dict.; Enc. Dict. 1896. In the light of these definitions, it admits of grave doubt whether the relationship existing between the judge and the master is comprehended by the language of the

statute. It is furthermore doubtful whether the appointment of a person to act as referee or special master in a given case is an appointment to an office or duty in the court, within the purview of the statute. But, whatever may be the correct view with reference to the questions last suggested, it is only necessary to say, at present, that they are questions to be determined in the first instance by the judge upon whom the duty of appointing a master or a referee is devolved. When a court is called upon to choose a master or referee, such action necessarily involves a consideration and decision of the question whether the person proposed is qualified to act in that capacity. The decision of that question is within the legitimate power of the judge, and is the exercise of a judicial function. It is difficult to perceive, therefore, how an error made in the decision of the question can have the effect of rendering all subsequent proceedings, based upon the action of the master, utterly nugatory and void, especially when, as in the present case, the judge himself was not disqualified to hear and decide the case, and the court over which he presided had acquired full jurisdiction of the parties and the subject matter. It results from these views that the final decree and the precedent orders were not utterly void, and that the court is without power to disturb the decree on a mere motion. An order will accordingly be entered overruling the same.[1]

[1] Only a portion of the opinion is reprinted.—Ed.

CHAPTER III.

CIRCUIT COURTS OF APPEALS.

SECTION I.

JURISDICTION.

MORGAN v. THOMPSON.

Circuit Court of Appeals, Eighth Circuit. 1903.

124 Fed. 203, 59 C. C. A. 672.

SANBORN, Circuit Judge.—This is a writ of error to review a judgment of the United States Court of Appeals of the Indian Territory which reversed a judgment of the United States Court for the Southern District of the Indian Territory, overruling a demurrer to a petition, and remanded the case to the trial court "for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered."

The jurisdiction of this court to review the judgment of the United States Courts of Appeals of the Indian Territory is derived from this provision of section 11, c. 145, Act March 1, 1895, 28 Stat. 698:

"Writs of error and appeals from the final decision of said Appellate Court shall be allowed and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States."

The act creating the Circuit Courts of Appeals grants jurisdiction to them to review the decisions of the Circuit Courts of the United States, in these words:

"That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act unless otherwise provided by law."

U. S. Comp. St. 1901, p. 549, § 6, Act March 3, 1891, c. 517, § 6, 26 Stat. 828.

A final decision, within the meaning of these provisions of the Acts of Congress, is one which completely adjudicates the rights of the parties to the suit, so that if it is affirmed the court below will have nothing to do but to execute the judgment or decrees which evidences the decision it has already rendered. An order, judgment, or decree which does not have this effect—one which leaves the rights of the parties to the suit undetermined and subject to further adjudication—is not a final decision, and the Courts of Appeals have no jurisdiction to review it. Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305, 308; Hooven, Owens & Renstschler Co. v. John Featherstone's Sons, 111 Fed. 81, 85, 49 C. C. A. 229, 233; Carmichael v. City of Texarkana, 116 Fed. 845, 846, 54 C. C. A. 179, 180, 58 L. R. A. 911. The judgment challenged by the writ of error in this case reversed the judgment below, and remanded the case to the trial court for further proceedings. The plaintiffs, William J. Thompson, Samuel C. Wall, and Ellen Wall, had brought an action of forcible entry and detainer against the defendants, William Morgan and Robert Morgan. The case had proceeded until a second amended petition had been interposed by the plaintiffs, and a demurrer to it by the defendants. The trial court sustained the demurrer and entered a judgment for the defendants. The plaintiffs appealed to the United States Court of Appeals in the Indian Territory. That court held the petition sufficient, reversed the judgment below, and remanded the case to the trial court for further proceedings not inconsistent with its opinion. The effect of this ruling of the Court of Appeals is to compel the trial court to overrule the demurrer, to permit the defendants to answer and to proceed to a trial of the issues which may be raised by the pleadings. The statutes of the Indian Territory provide that "upon a demurrer being overruled the party demurring may answer or reply." Ind. T. Ann. St. 1899, § 3284; Mans. Dig. 5079. Thus it conclusively appears that the judgment of the Court of Appeals reversing the judgment of the trial court is not a final decision of the rights of the parties to the controversy, but that these rights remain undetermined, and subject to the trial of the issues which are yet to be framed and determined in the trial court.

The Supreme Court has jurisdiction in certain classes of cases to review "a final judgment or decree in any suit in the highest court of a state." Rev. St. § 709, U. S. Comp. St. 1901, p. 575,

§ 709. But that court held that a judgment of the Supreme Court of Wisconsin reversing a judgment of an inferior court which overruled a demurrer to a complaint was not a final judgment, and could not be reviewed in that court, because it did not finally determine the rights of the parties but remanded the case to the court below for further proceedings. Great Western Tel. Co. v. Burnham, 162 U. S. 339, 341, 342, 16 Sup. Ct. 850, 40 L. Ed. 991. There is a long line of decisions in that court to the effect that a judgment of a Supreme Court of a State reversing a judgment, order, or decree of a trial court, and remanding the case for further proceedings either at law or in equity, is not a final decision, and cannot be reviewed by the Supreme Court of the United States.[1] * * *

Whether the question be considered from the standpoint of reason or of authority, the conclusion is inevitable that a judgment which reverses the order or judgment of a trial court, and remands the case for a subsequent hearing and adjudication of the rights of the parties, is not a final decision which may be reviewed either in Supreme Court or in this court under the Acts of Congress to which reference has been made. The judgment of the Court of Appeals of the Indian Territory was of this character. This court is without jurisdiction to review it, and the writ of error must be dismissed.[2]

AMERICAN SUGAR-REFINING CO. v. JOHNSON.

Circuit Court of Appeals, Fifth Circuit. 1893.

60 Fed. 503, 9 C. C. A. 110.

In the action in the Circuit Court judgment was given for the plaintiff. The defendant sued out a writ of error. His first as-

1 A long list of such cases is omitted.—Ed.

2 In the following cases it was held that the decision of the lower court was final: Vicksburg v. Henson, 231 U. S. 259, 264-267, 34 S. Ct. 95, 97-98, 58 L. Ed. 209, 214-215 (1913); Stevirmac Oil & Gas Co. v. Dittman, 245 U. S. 210, 216-217, 38 S. Ct. 116, 118, 62 L. Ed.—(1917); Tornanses v. Melsing, 106 Fed. 775, 783-785, 45 C. C. A. 615, 624-626 (1901); Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co., 129 Fed. 105, 107, 63 C. C. A. 607, 609 (1904).

But see, contra, Kingman v. Western Mfg. Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192 (1898); Whitworth v. United States, 114 Fed. 302, 303-304, 52 C. C. A. 214, 215-216 (1902); Odbert v. Marquet, 175 Fed. 44, 48-51, 99 C. C. A. 60, 64-67 (1909); Emery v. Central Trust & Safe Deposit Co., 204 Fed. 965, 968 (1913).—Ed.

signment of error was to the effect that the Circuit Court did not have jurisdiction of the action.[1]

PARDEE, Circuit Judge (after stating the facts).—The record shows that the question of jurisdiction of the Circuit Court was not raised in the court below, and of course the jurisdiction is not certified as involved in the case. The first assignment of error raises the question in this court that the jurisdiction of the Circuit Court does not appear from the face of the record. The appellee, relying upon the textual provisions of section 5 of the Judiciary Act of 1891, which is to the effect that appeals or writs of error may be taken from the District courts or existing Circuit courts direct to the Supreme Court in any case in which the jurisdiction of the court is in issue, and upon the terms of the sixth section, which restrict the jurisdiction of the Circuit Courts of Appeal to cases other than those provided for in the fifth section, contends that this assignment of error cannot be considered in this court.

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Railway Co. v. Swan, 111 U. S. 379-389, 4 Sup. Ct. 510.

In the case of McLish v. Roff the Supreme Court of the United States, in construing the fifth and sixth sections of the Judiciary Act of 1891, among other things, said:

"The true purposes of the act, as gathered from its context, is that the writ of error or the appeal may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case. If the latter,

[1] The facts are restated.—Ed.

then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court." 141 U. S. 661-668, 12 Sup. Ct. 118.

Relying upon the construction given in McLish v. Roff, the practice of this court has been, where an appeal or writ of error has been taken in the whole case, and the question of jurisdiction in the court below has been raised, to pass upon the question of jurisdiction as upon any other issue raised in the case. And accordingly, in Telephone Co. v. Robinson, 2 U. S. App. 148, 1 C. C. A. 91, 48 Fed. 769, which was a case in which the jurisdiction of the Circuit Court was not apparent of record, this court held that the jurisdiction of the Circuit Court must appear affirmatively in the record, citing Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193; Timmons v. Land Co., 139 U. S. 378, 11 Sup. Ct. 585; and also held that, "where the jurisdiction of the Circuit Court does not appear in the record, the Appellate Court will, on its own motion, notice the defect, and make disposition of the case accordingly;" and we then reversed the decree of the Circuit Court remanding the cause to the court below with instructions to remand to the State Court from which it was removed. And in Railway Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378, and in Tinsley v. Hoot, 2 U. S. App. 548, 3 C. C. A. 612, 53 Fed. 682, this court followed the same practice. In the case of Carey v. Railway Co. (recently decided, but not yet officially reported) 14 Sup. Ct. 63, the Supreme Court says:

"The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided), and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court. The fifth section of the act specifies six classes of cases in which appeals or writs of error may be taken directly to this court, of which we are only concerned with the first and fourth, which include those cases 'in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision,' and 'any case that involves the construction or application of the Constitution of the United States.' In order to bring this appeal within the

first of these classes, the jurisdiction of the Circuit Court must have been in issue in this case, and, as appeals or writs of error lie here only from final judgments or decrees, must have been decided against appellants; and the question of jurisdiction must have been certified. We do not now say that the absence of a formal certificate would be fatal, but it is required by the statute, and its absence might have controlling weight where the alleged issue is not distinctly defined."

Reading the fifth and sixth sections of the Act of 1891 in the light of McLish v. Roff and Carey v. Railway Co., and the former practice of this court, we consider that the exclusive jurisdiction of the Supreme Court, in any case where the jurisdiction of the court is in issue, only attaches when the appeal or writ of error is taken direct to that court, and that, when not so taken, but the appeal or writ of error is taken on the whole case to the Circuit Court of Appeals, that court is vested with jurisdiction to pass on all the issues involved. As to certifying a jurisdictional question to the Supreme Court in such cases, that is only to be done when the instruction of that court is desired for the proper decision of the case. Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct. 594.

We consider, therefore, that we have full jurisdiction to pass upon the first assignment of error in this case.[1]

LAU OW BEW v. UNITED STATES.

Supreme Court of the United States. 1892.

144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

Before proceeding to dispose of this case upon the merits the question of jurisdiction, although not argued by counsel, must receive attention.

The Act of Congress of March 3, 1891, establishing Circuit Courts of Appeals and defining and regulating the jurisdiction of the courts of the United States, 26 Stat. 826, c. 517, was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, which

[1] Compare carefully Baltimore & O. R. Co. v. Meyers, 62 Fed. 367, 371-372, 10 C. C. A. 485, 489, 18 U. S. App. 569, 577-578 (1894).

See also American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 S. Ct. 646, 45 L. Ed. 859 (1901).—Ed.

impeded the examination of cases of public concern, and operated to the delay of suitors. In re Woods, 143 U. S. 202. * * *

Under section 5, appeals or writs of error may be taken from the Circuit Courts directly to this court in six specified classes of cases, namely:

"(1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. (2) From the final sentences and decrees in prize causes. (3) In cases of conviction of a capital or otherwise infamous crime. (4) In any case that involves the construction or application of the Constitution of the United States. (5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

By section 6, the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error," final decisions of the Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed. McLish v. Roff, 141 U. S. 661, 666.

The words "unless otherwise provided by law" were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purposes of the act and be inconsistent with its context and its repealing clause.[1]

KEYSER v. LOWELL.

Circuit Court of Appeals, Eighth Circuit. 1902.

117 Fed. 400, 54 C. C. A. 574.

SANBORN, Circuit Judge, after stating the case, delivered the opinion of the court.

[1] Only a portion of the opinion is reprinted.—Ed.

This case involves the question whether or not a statute of the State of Colorado is obnoxious to section 1 of article 4 of the Constitution of the United States, but the jurisdiction of the court below was not invoked upon that ground. The sole ground upon which the jurisdiction of the Circuit Court originally attached was the diversity of the citizenship of the parties. The constitutional question was not presented or suggested, and it did not arise until the answer was interposed. This court, therefore, has jurisdiction to hear and determine the question of the validity of the statute, in view of the Constitution of the United States, as well as the other questions in the case, and its decision of each of these questions will be final. Where the jurisdiction of the Circuit Court originally attaches solely by reason of diverse citizenship and a constitutional question subsequently arises, the Circuit Court of Appeals has jurisdiction to review the decision of that question below and to finally determine it.[1]

ROOT v. MILLS.

Circuit Court of Appeals, Seventh Circuit. 1909.

168 Fed. 688, 94 C. C. A. 174.

GROSSCUP, Circuit Judge.—The bill in the court below asked that appellants, trustees under the will of Augustin K. Root and executors thereof, be removed, and that pending action of the court upon such bill, a receiver be appointed to take charge of the assets of the estate until other trustees might be appointed. The bill was filed October 25, 1907, and upon the same day, upon an *ex parte* hearing, a receiver was appointed, who took possession of the property therein named.

November 2d, following, the defendants by their solicitors, moved the court to so modify the foregoing order that, pending the final determination of the case, the trustees might be permitted to collect, receive and distribute to the parties entitled

[1] Only a portion of the opinion is reprinted.
Notice particularly Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 6-7, 44 C. C. A. 333, 338-339 (1900) to the effect that though the case is one which is controlled "by the construction or application of the Constitution of the United States," the Circuit Court of Appeals "may decide the whole case in the first instance."—Ed.

thereto under the will, the income of the securities belonging to the estate; which motion was, on the 9th day of November following, after argument of counsel, duly denied, the defendants on the preceding day having entered their general appearance in the cause.

December 5th, following, defendants filed their motion to discharge the receiver and dissolve the injunction (an injunction merely incidental to the receivership), which motion was overruled on the 21st day of February, 1908; and thereupon, on the 2d day of March following, defendants filed their application for appeal. The motion under consideration is to dismiss this appeal upon the ground that it was not taken within thirty days after the entry of the decree appealed from.

Section 7 of the Act approved April 14, 1906 (34 Stat. 116, c. 1627 (U. S. Comp. St. Supp. 1907, p. 209) provides:

"That where upon a hearing in equity in a district or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed, by an interlocutory order or decree, in any case, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals: provided that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court."

This section, in the interest of a more liberal right of appeal, is a distinct departure from the policy of appeals under the older Chancery rules; but is intended to be safeguarded against abuse by the provisions looking to promptitude of action—a provision that is intended to be strictly enforced.

The contention of appellee is that the date of "entry of the order appointing the receiver" is October 21st, 1907. Joseph Dry Goods Co. et al. v. Hecht, 120 Fed. 760, 57 C. C. A. 64 (Circuit Court of Appeals, 5th Circuit). The contention of appellants is, that the date of such "entry" is February 21st, 1908, the day when the motion to dissolve the order was overruled.

We cannot concur in either of these views. What constitutes the "entry" of the order within the meaning of section 7, the date of which determines the time for the appeal, depends, it seems to us, upon what meaning is to be attached to the preceding phrase "Where, upon a hearing of equity"—a phrase that determines the conditions on which the order is to be entered.

A "hearing in equity," technically, is the trial of the case,

including the introduction of evidence, the argument of the solicitors, and the decree of the chancellor. 10 Encyclopedia Pleading and Practice, 8.

This, however, is the "hearing in equity" that results in a final decree.

Now it seems to us that within the proceedings that, taken as a whole, constitute a hearing in equity resulting in a final decree, there is recognized by section 7 to be other proceedings, interlocutory with reference to the final decree, but complete for the purposes of the appeal allowed, viz.: the particular proceedings out of which grow an interlocutory order; and that in such particular proceeding, within the larger proceeding, the "hearing in equity" provided in section 7, was meant to be the hearing of the motion, the introduction of evidence thereon by affidavit or otherwise, the argument of solicitors, and the order of the chancellor. Nothing short of that, it seems to us, can be said to be a "hearing in equity" upon the particular proceeding leading up to the appealable order; and nothing beyond that, it seems to us, could have been contemplated by this section.

Let us apply that view, then, to the case in hand. Undoubtedly the court has power, *ex parte*, to enter an order granting an injunction in the nature of a stay, or appointing a receiver, which becomes at once an enforceable order in the case. But such order is not, in our judgment, "upon a hearing in equity" within the meaning of section 7. There has in fact on such order been no "hearing"—no opportunity on the part of one of the parties affected to introduce evidence, or to argue the cause. But none the less it is an order—an order substantially ripening into one "upon a hearing in equity," whenever the parties affected have been brought, or have come, into court, and an opportunity has been given them either to acquiesce in the order or to oppose it —the order to be considered "entered" within the meaning of the statutes the moment that it has been acquiesced in, or has been unsuccessfully opposed. Indeed any other interpretation of this section, enacted in the interest of a more liberal policy of appeal, but upon the strict condition of promptitude, would have the effect either of enabling a party to cut off his antagonist's right of appeal by not advising him for thirty days of the order entered, or of enabling the party proceeded against to cut off the moving party from his right of having the appeal promptly taken, by not moving for a dissolution of the order until it suited his purposes

to do so. And applying the section as we here interpret it the appeal must be dismissed, as appellants, in their motion of November 2d, seem to have clearly acquiesced in the order appealed from as a standing interlocutory order in the cause.

The appeal is dismissed.[1]

DUDLEY E. JONES CO. v. MUNGER IMPROVED COTTON MACH. MFG. CO.

Circuit Court of Appeals, Fifth Circuit. 1892.

50 Fed. 785, 1 C. C. A. 668.

PARDEE, Circuit Judge.—This cause is again brought before the court on an application for a rehearing and upon a motion to vacate all proceedings had in this cause in this court, and dismiss the appeal herein for want of jurisdiction, on the ground that the decree of the court below sought to be reviewed in this case was neither a final decree, from which an appeal would lie to this court under the sixth section of the Judiciary Act of 1891, nor yet such an interlocutory order or decree that an appeal would lie under the seventh section of the said act. The case was heard in this court upon the merits without objection on the part of the appellee, and without a critical examination on the part of the court as to the character of the decree appealed from. In fact, appellee in his brief expressly states:

"It is the desire of the appellee that this cause be heard upon its merits, and we do not, therefore, wish to take advantage of any irregularities which may have occurred in bringing the case up or of any omission to assign errors. * * * As the case stands, it must be substantially treated as a rehearing at the Circuit, and for this reason the argument is more diffusive than it otherwise would be, as it involves a re-presentation of the entire case, without any direction as to special points or findings by the court below."

[1] For other cases in which it was held there was a hearing in equity, see Taylor v. Breese, 163 Fed. 678, 683-684 (1908); Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n, 165 Fed. 1, 5 (1908).

See, also, Pack v. Carter, 223 Fed. 638, 640-641, 139 C. C. A. 184, 186-187 (1915).—Ed.

An examination of the decree rendered by the court below shows that, while it adjudges the validity of the patent sued on and directs an injunction termed "perpetual" against the defendants as infringers, it refers the matter to a master for taking an account. It is well settled that such a decree is not a final decree from which an appeal could be taken, or of which this court would have jurisdiction, under the sixth section of the Judiciary Act of 1891. Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. Rep. 32, and cases there cited. We are, however, of the opinion that it is an interlocutory decree granting an injunction, from which an appeal would lie under the seventh section of the said Judiciary Act.

An interlocutory decree is:

"When the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing." Daniell, Ch. Pr. (5th Ed.) 986.

Again:

"In fact, till a decree has been enrolled, and thereby become a record, it is liable to be altered by the court itself, upon a rehearing, while a decree which has not been enrolled is not susceptible to alteration, except by the house of lords or by bill of review. For this reason it is that a decree which has not been enrolled, although it is, in its nature, a final decree, is considered merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter." Id. 1019.

In the note to page 986, *supra,* the subject is considered at some length, to the effect that the courts have not laid down any satisfactory definition of what is an "interlocutory decree." It is said that the difficulty is in the subject itself, for, by various gradations, the interlocutory decree may be made to approach the final decree until the line of discrimination becomes too fine to be readily perceived. It is further said that the difficulty has been increased by the fact that the definition of a final decree has often been made to turn, not upon the nature of the determination, but upon the construction of the statutes regulating appeals. An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the Judiciary Act of 1891, is a new feature of the practice in the United States courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the in-

tention of the lawmaker. The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of property, were, under the practice of the courts, frequently rendered long before the final hearing in the case, and operated, to a great extent, in the nature of execution before judgment. This mischief was as great in patent cases, where parties on hearings preliminary to the final decree were enjoined pending long and tedious examination in the matter solely of accounting, as in any other cases of preliminary injunction. The case of Richmond v. Atwood, decided in the first Circuit, and reported in 48 Fed. Rep. 910, was a case on all fours with the present one, and therein the court took and exercised jurisdiction, apparently without question. The suit was one for an infringement of letters patent wherein an appeal was taken from a decree sustaining the patent, holding the defendant to be an infringer, awarding an injunction, and ordering an account. This court having jurisdiction of the appeal under the seventh section, and having jurisdiction under the sixth section, if a final decree had been rendered in the Circuit Court, it would seem to have been competent for the appellee to waive a formal final decree, and submit the cause of this court on the merits. Our conclusion in the matter is that in this case the Circuit Court of Appeals was seized of jurisdiction under the seventh section of the Act of 1891, and that, as the appellee submitted the case without objection, it is now too late to question the jurisdiction of the court, even if doubtful. After re-examination of the case, and a consideration of the briefs lately filed, we find no reason to disturb our former conclusions as to novelty of appellee's patent, or on the question of appellant's infringement. Our decree, however, was perhaps too broad, and should be modified.

The order of the court is that the motion to vacate the proceedings in this cause, and to dismiss the appeal for want of jurisdiction, be denied; that our former decree, remanding the cause, with directions to dismiss the bill, with costs, be, and the same is, modified so as to direct the cause to be remanded to the Circuit Court, with instructions to dissolve and dismiss the injunction granted in said court; and that appellee pay the costs, and the rehearing applied for be denied.[1]

[1] See also Pennsylvania Co., etc., v. Jacksonville, T. & K. W. Ry. Co., 55 Fed. 131, 136 (1893).—Ed.

DREUTZER v. FRANKFORT LAND CO.

Circuit Court of Appeals, Sixth Circuit. 1895.

65 Fed. 642, 13 C. C. A. 73.

The Circuit Court made an order on January 23rd, restraining defendants from prosecuting certain proceedings at law, upon condition that plaintiffs should file a bond to pay any judgment against them in the suit, in which the injunction was granted, such injunction to continue, if the bond was filed until the further order of the court. The bond was filed in due time. Subsequently, on March 2d, defendant moved to dissolve the injunction, upon the same grounds upon which he had originally opposed it, and the additional ground that the sureties on the bond were insufficient. This motion was denied by an order entered March 9th. An appeal was taken from this order on April 6th.[1] * * *

TAFT, Circuit Judge (after stating the facts).—Section 7 of the act establishing the Circuit courts of appeals is as follows:

"That where upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals. Provided, that the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." 11 C. C. A. xv.

The section introduced into Federal appellate procedure is a novelty. Before enactment, there was no method of reviewing on appeal an interlocutory order or decree of the District or Circuit courts. Congress accompanied this remedial provision with the condition that it should be taken advantage of by the aggrieved party within 30 days after it accrued. This condition is to be given effect, and is not to be made nugatory by a construction which would put it in the power of the aggrieved party to extend

[1] The facts are restated as found in the syllabus.—Ed.

the limitation indefinitely. It is clear, therefore, that when, after a hearing of both sides, an injunction has been granted by the Circuit Court to continue in force for a fixed time,—as, for example, until a hearing on the merits,—the enjoined party cannot, after the expiration of 30 days from the order granting the injunction, acquire a new right of appeal by the filing of a motion to dissolve the injunction, and an order of the court denying the motion. Such an order neither grants nor continues the injunction within the meaning of section 7 of the act. Even if no such order is made, the injunction remains in force until the time fixed in the order granting it for its expiration. And the denial of the motion to dissolve the injunction adds nothing to its force or effect. The question may be more doubtful when the injunction is granted until the further order of the court. It may be argued, with some plausibility, that the form of the order impliedly invites a further test of the validity of the order by a motion to dissolve, but we are not disposed so to construe it when it appears that a full hearing has been had by the court on affidavits and argument. We think that an injunction until further order of the court granted after full hearing is, in effect, the same as one granted until the case can be heard on its merits, and that a motion to dissolve such an injunction is, in effect, a mere motion to rehear a question already decided. Unless such motion to rehear is made within the time within which an appeal can be taken, we think it should have no effect to enlarge the limitation. It is not at all difficult to satisfy the meaning of the expression, "order continuing an injunction." It generally happens that a preliminary injunction expires at the entry of a decree on the merits. Such a decree may grant a perpetual injunction, and yet, because of an order referring questions of damages to a master, still be only interlocutory in its character, and not reviewable as a final appeal until the coming in of the master's report, and its confirmation by the court. Blount v. Société Anonyme, 6 U. S. App. 335, 53 Fed. 98. Such a decree would be an interlocutory decree continuing an injunction. So, too, a court may, for good reasons, grant an injunction until the next term of the court. An order giving the injunction force thereafter would be an order continuing an injunction, because, without such order, the injunction would stand dissolved by lapse of the time fixed in the original order. Sections 718 and 719 of the Revised Statutes are as follows:

Section 718. "Whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

Section 719. "Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a Circuit Court in cases where they might be granted by such court. But no justice of the Supreme Court, shall hear or allow any application for an injunction or restraining order in any cause pending in the Circuit to which he is allotted, elsewhere than within such Circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the Circuit judge of the Circuit or the District judge of the District. And an injunction shall not be issued by a District judge, as one of the judges of a Circuit Court in any case where a party has had a reasonable time to apply to the Circuit Court for the writ; nor shall any injunction so issued by a District judge continue longer than to the Circuit Court next ensuing, unless so ordered by the Circuit Court."

Thus it appears that an injunction granted by a District judge as a member of the Circuit Court, after a hearing in chambers, will not continue longer than to the next session of the Circuit Court. If the Circuit Court continues the force of the injunction, its action is an order or decree continuing an injunction, and an appeal may be taken from it within 30 days therefrom. It is not necessary for us to decide whether a restraining order issued *ex parte* under section 718 to continue in force till the decision on the motion for a preliminary injunction is appealable, though we are inclined to think that it is not, because appeals are permitted only to orders of injunction; and the foregoing sections suggest a statutory terminology in which a temporary restraining order issued *ex parte* is to be distinguished from an order of injunction, though, of course, their operation and effect are quite the same. More than this, the appeal is allowed from an order granting an injunction "upon a hearing in equity," which would hardly describe an order made on an *ex parte* application. An order of injunction, issued on a motion

after notice, though preceded by a temporary restraining order issued under section 718, would therefore be an order "granting" an injunction, rather than an order continuing it. In the light of the foregoing construction of section 7 of the Circuit Court of Appeals Act, we have little difficulty in holding that this appeal was not brought in time. The order granting the injunction was made, after full hearing, on January 23, 1894, and was operative from that date without further action of the court, though it was liable to be defeated in case the complainant should make default in giving the bond required. That order was certainly appealable under section 7. The time within which the appeal could be allowed expired 30 days thereafter. No motion to rehear the issue decided or to dissolve the injunction was made within that time. The injunction was issued on condition of the execution of a bond with approved sureties. The bond was filed February 5th, with a certificate of the sufficiency of the sureties by the clerk and master of the State Chancery Court of the county where the sureties lived. A motion was then filed, March 2, 1894, on the same grounds upon which the granting of the injunction, January 23, 1894, had been resisted and on the additional ground that the bond filed did not comply with the order of the court, because insufficient. This last ground was addressed to the discretion of the court, and could hardly be the subject of review here. The bond having been held sufficient, the order of injunction must be considered as in effect from the date of entry, because the condition of its granting had been complied with. The order denying the motion to dissolve did not continue the injunction. Without such ruling by the court, after the filing of the bond, the injunction would have remained in force. The necessity for the ruling of the court arose, not by reason of the order of injunction, but by reason of the motion to dissolve. It follows that the order of March 9, 1894, was not an order continuing an injunction, and that no appeal lay therefrom under the seventh section of the Circuit Court of Appeals Act, and that, though the order of January 23d was appealable, the time for allowing the appeal expired more than 30 days before this appeal was allowed. This requires us to dismiss the appeal without considering the assignments of error, and it is so ordered.[2]

[2] In granting an interlocutory injunction the court need not use the technical words "restrain and enjoin." Griesa v. Mutual Life Ins. Co., 165 Fed. 48, 50, 91 C. C. A. 86, 88 (1908).—Ed.

AMERICAN GRAIN SEPARATOR CO. v. TWIN CITY SEPARATOR CO.

Circuit Court of Appeals, Eighth Circuit. 1912.

202 Fed. 202, 120 C. C. A. 644.

SANBORN, Circuit Judge. * * *

(1) There is force in the argument that the hearing on the motion to dissolve is only a rehearing of the motion for an injunction, and an order denying a rehearing is not appealable. But there is no exception in the statute of orders refusing to dissolve injunctions which rest on mere rehearings of motions to grant them from the general declaration of the Congress that:

"Where, upon a hearing in equity in a District Court, or by a judge thereof in vacation, * * * an application to dissolve an injunction shall be refused, * * * an appeal may be taken from such interlocutory order or decree * * * refusing to dissolve an injunction." 36 Stat. c. 231, § 129, p. 1134.

And the fact that Congress made no such exception raises a conclusive legal presumption that it intended to make none, and it is not the province of the courts to do so.[1]

SMITH v. VULCAN IRON WORKS.

Supreme Court of the United States. 1897.

165 U. S. 518, 17 S. Ct. 407, 41 L. Ed. 810.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The Act of March 3, 1891, c. 517, establishing Circuit Courts of Appeals, after providing in section 5, for appeals from the Circuit Courts and District Courts directly to this court in certain classes of cases; and, in section 6, for appeals from final decisions of those courts to the Circuit Court of Appeals in all other cases, including cases arising under the patent law; further provides, in

[1] Only a portion of the opinion is reprinted.—Ed.

section 7, that "where, upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, during the pendency of such appeal." 26 Stat. 828.

The questions presented by each of these cases are whether, in a suit in equity for the infringement of a patent, an appeal to the Circuit Court of Appeals from an interlocutory order or decree of the Circuit Court, granting an injunction, and referring the case to a master to take an account of damages and profits, may be from the whole order or decree, or must be restricted to that part of it which grants the injunction; and whether the Circuit Court of Appeals, upon such an appeal, may consider and decide the merits of the case, and, if it decides them in the defendant's favor, may order the bill to be dismissed.

Upon these questions there has been some diversity of opinion among the Circuit Courts of Appeals of the different Circuits. But those courts have now generally concurred in taking the broader view of the appeal itself, and of the power of the Appellate Court.

In the earliest of such appeals, the cases were examined on the merits, and, upon a reversal of the order or decree appealed from, the authority to direct the bill to be dismissed was assumed, without question, in the Circuit Courts of Appeals for the Fifth Circuit: Dudley E. Jones Co. v. Munger Co. (December, 1891), 2 U. S. App. 55; for the First Circuit: Richmond v. Atwood (February, 1892), 5 U. S. App. 1; and for the Second Circuit: American Pail Co. v. National Box Co. (July, 1892), 1 U. S. App. 283. The cases in the Fifth and First Circuits were afterwards reconsidered upon petitions for rehearing. In the Fifth Circuit, the decree was modified so as only to direct the injunction to be dissolved. Dudley E. Jones Co. v. Munger Co. (May, 1892), 2 U. S. App. 188. But in the First Circuit, the power of the Circuit Court of Appeals, upon such an appeal, to consider the merits of the case, and to order the bill to be dismissed, was maintained,

after thorough discussion of the subject on principle and authority, in an opinion delivered by Judge ALDRICH. Richmond v. Atwood (September, 1892), 5 U. S. App. 151. * * *

In the Sixth Circuit, on the other hand, in a case in which the Circuit Court had entered an interlocutory decree sustaining the validity of the patent, adjudging that there was an infringement, ordering an account of damages and profits, and granting an injunction, and had allowed an appeal from so much only of that decree as granted the injunction, and denied an appeal from the rest of the decree, the Circuit Court of Appeals, in an opinion delivered by Mr. Justice JACKSON (then Circuit Judge) with the concurrence of Judge TAFT and Judge HAMMOND, held that the appeal had been properly restricted by the Circuit Court, and that the Circuit Court of Appeals had no authority, upon this appeal, to hear and fully determine the merits of the case, but that those remained, notwithstanding the appeal, within the jurisdiction and control of the Circuit courts. That decision was made before the second decision in Richmond v. Atwood, 5 U. S. App. 151, above cited, had been reported, and without reference to the practice of courts of chancery elsewhere. And it was said in the opinion: "It would doubtless have been well if, in the creation of this court, the seventh section of the act had permitted or authorized an appeal from interlocutory decrees sustaining the validity of patents and adjudging their infringement, so as to obviate in many cases the taking of expensive accounts, and the delay incident thereto." Columbus Watch Co. v. Robbins (October, 1892), 6 U. S. App. 275, 281. A certificate thereupon made by the Circuit Court of Appeals, for the purpose of obtaining the instructions of this court, was dismissed by this court, with Mr. Justice JACKSON'S concurrence, because no question of law was distinctly certified, and because the Circuit Court of Appeals had decided the case before granting the certificate. 148 U. S. 266.

That decision was long treated as settling the practice in that Circuit on appeals from such interlocutory decrees, and as permitting the questions of validity and infringement to be considered only so far as they effected the granting or refusal of an injunction. Blount v. Société Anonyme (November, 1892), 6 U. S. App. 335; Columbus Watch Co. v. Robbins (October, 1894), 22 U. S. App. 601, 634; Duplex Press Co. v. Campbell Press Co. (July, 1895), 37 U. S. App. 250; Thompson v. Nelson (November, 1895), 37 U. S. App. 478; Goshen Co. v. Bissell Co. (December, 1895, and February, 1896), 37 U. S. App. 555, 689.

But, at last, the Circuit Court of Appeals of the Sixth Circuit, in an able and elaborate opinion delivered by Judge LURTON, with the concurrence of Judge TAFT and Judge HAMMOND, being a majority of the court which had made the decision, in Columbus Watch Co. v. Robbins, 6 U. S. App. 275, above cited, expressly overruled that decision, and brought the practice in that Circuit into harmony with the practice prevailing in other circuits. Bissell Co. v. Goshen Co. (March, 1896), 43 U. S. App. 47; Dueber Co. v. Robbins (May, 1896), 43 U. S. App. 391. * * *

The provision of section 7 of the Act of 1891, that where "upon a hearing in equity" in a Circuit Court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken from such interlocutory order or decree granting or continuing such injunction" to that court, authorizes, according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further ligitation, should the Appellate Court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

The power of the Appellate Court over the cause of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal. Hovey v. McDonald, 109 U. S. 150, 160, 161; In re Haberman Co., 147 U. S. 525, Messonnier v. Kauman, 3 Johns. Ch. 66.

In each of the cases now before the court, therefore, the Circuit Court of Appeals, upon appeal from the interlocutory decree of the Circuit Court, granting an injunction and ordering an account, had authority to consider and decide the case upon its merits,

and thereupon to render or direct a final decree dismissing the bill.[1]

MOREHOUSE v. PACIFIC HARDWARE & STEEL CO.

Circuit Court of Appeals, Ninth Circuit. 1910.

177 Fed. 337, 100 C. C. A. 647.

Petition to review proceedings of the District Court of the United States for the District of Nevada, in bankruptcy.

In the matter of bankruptcy proceedings against the Exploration Mercantile Company, instituted by the Pacific Hardware & Steel Company and others, petitioning creditors, in which an injunction was issued against the bankrupt and others. An order was thereafter granted requiring petitioners to show cause why they should not be adjudged guilty of contempt for disobeying the injunction, and petitioners filed a petition to review. Dismissed.[2] * * *

GILBERT, Circuit Judge (after stating the facts).—The respondents move to dismiss the petition on several grounds, only one of which need be considered; and that is, that the matter complained of is not reviewable until the petitioners shall have been adjudged guilty of contempt in the court below. If the order which is complained of were conceded to be an order in a bankruptcy proceeding proper, and of the class of proceedings which are made subject to the supervisory control of this court, it would seem, nevertheless, that it is not reviewable on petition for the reason that it is not an interlocutory order which determines any substantial right of the petitioners. An order to show cause is but the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands. It is in the nature of process, and, in jurisdictions where interlocutory orders are made appealable if they affect substantial rights, it is held that an order to show cause is not of that nature. Grey et al. v. Gaither, Ex'r, 71 N. C. 55; McAuliffe v. Coughlin, 105 Cal. 268, 38 Pac. 730.

But, conceding the order to show cause to be a judgment of the

[1] Only a portion of the opinion is reprinted.

Compare Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 280-281, 38 S. Ct. 80, 83, 62 L. Ed.—(1917).—Ed.

[2] The petition is omitted.—Ed.

court affecting a substantial right, we are of the opinion that a proceeding to punish for contempt one who has committed an act in violation of an injunction of a court of bankruptcy in a collateral matter, as in this case, is not a "proceeding in bankruptcy" which is subject to review in this court on original petition. Section 24 of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431])[3] establishes the appellate jurisdiction of Circuit Courts of Appeals over "controversies arising in bankruptcy proceedings" and their jurisdiction in equity, "either interlocutory or final, to revise in matter of law proceedings of the inferior courts of bankruptcy." Section 25a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings, "in respect of which special provision therefor was required." Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. There is in the language of the act nothing to indicate that the revisory power so given to the Circuit Courts of Appeals is more extensive than that which was exercised by the Circuit Courts under Bankr. Act, March 2, 1867, c. 176, 14 Stat. 517. In Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414, it was held that the appellate jurisdiction conferred on the Circuit Courts by the Act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized

[3] The following is the 24th section and part of the 25th section of the bankruptcy act which is referred to above:

Jurisdiction of Appellate Courts.—a. The Supreme Court of the United States, the Circuit Court of Appeals of the United States; and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

b. The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. (July 1, 1898, c. 541, § 24, 30 Stat. 553.)

Appeals and Writs of Error.—a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the Appellate Court in term or vacation, as the case may be.

in construing the Bankruptcy Act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and the revisory jurisdiction [4] does not include any orders or decrees which are appealable or reviewable on writ of error. In re Rusch, 116 Fed. 270, 53 C. C. A. 631; Walter Scott & Co. v. Wilson, 115 Fed. 284, 53 C. C. A. 76; In re Friend, 134 Fed. 778, 67 C. C. A. 500; In re Mueller, 135 Fed. 712, 68 C. C. A. 349; Odell v. Boyden, 150 Fed. 731, 80 C. C. A. 397; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; First National Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

It is conceivable that the line of demarcation between "proceedings in bankruptcy" and controversies at law and in equity "in the course of bankruptcy proceedings," may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public. Section 2 (13) of the Bankruptcy Act gives the court of bankruptcy power to enforce obedience, by its officers and other persons, to all lawful orders, by fine or imprisonment, or both.

[4] For discussion dealing with the appellate and supervisory jurisdiction of the Circuit Court of Appeals in bankruptcy cases, see Brandenburg on Bankruptcy (4th Ed. 1917) pp. 1202-1206, 1210-1215, 1224-1232; Collier on Bankruptcy (11th Ed. 1917) pp. 563-568, 570, 573-587, 591-599.—Ed.

But the power of a court of bankruptcy to punish for a contempt does not rest alone upon the statute. It is a power which is inherent in all courts. Said the court in Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205:

"The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

A proceeding to punish for contempt committed in violation of an injunction issued in any suit or proceeding is a proceeding entirely distinct and separate from that in which the injunction was issued, and judgment therein is always reviewable by a writ of error even before final decree in the original case. Bassette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co., 129 Fed. 105, 63 C. C. A. 607; Butler v. Fayerweather, 91 Fed. 458, 33 C. C. A. 625; Gould v. Sessions, 67 Fed. 163, 14 C. C. A. 366. The case before the court is clearly distinguishable from Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, in which the question involved was whether the Bankruptcy Act authorizes the trustee to compel by process for contempt, the surrender to the trustee of assets properly belonging to the estate, and in re Cole, 144 Fed. 392, 75 C. C. A. 330 (Id. 163 Fed. 180, 90 C. C. A. 50), in which the Circuit Court of Appeals for the first Circuit entertained jurisdiction upon a petition for revision of an order of the court of bankruptcy directing that the bankruptcy turn over and deliver a certain sum of money to the trustee within 15 days, "in default of which she stand committed to the marshal of this district to be incarcerated until she obeys the order of this court," etc. Those were not proceedings to punish for contempt already committed, but orders, the purpose of which was to require the payment to the trustees of the money of the estate, and the commitments for contempt were alternative and for the purpose of compelling obedience to the orders.

The petition must be dismissed, with cost.

CHAPTER IV.

SUPREME COURT.

SECTION I.

JURISDICTION.

In re BAIZ.

Supreme Court of the United States. 1890.

135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers, and consuls." Const. Art. III, sec. 2.

By section 687 of the Revised Statutes, it is provided that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants as a court of law can have consistently with the law of nation; and original but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or a vice-consul is a party." By section 563, it is provided that "the District Courts shall have jurisdiction as follows: * * * Seventeenth. Of all suits against consuls or vice-consuls," except for certain offenses. The petitioner has been, since July, 1887, the consul general of the Republic of Guatemala, and therefore the District Court has jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the District Court, that at the time of the commencement of the action and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said republic

(of Guatemala) in the United States," and for that reason came within the words of section 687, "other public ministers." * * *

Under section 2, Art. II, of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of Art. III. These agents may be called ambassadors, envoys, ministers, commissioners, chargé d'affaires, agents, or otherwise, but they possess in substance the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 Opinions Attys. Gen. (Cushing) 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargé d'affaires, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

Section 4130 which is the last section of the title (Title XLVII, "Foreign Relations"), is as follows: "The words 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul." * * *

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, Droit. Int. 586, 2d ed. Paris 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the

affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." Guide Pratique des Consulats, Vol. 1, p. 93.

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the Government or country to which he is appointed, or any other country or Government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice STORY, in The Anne, 3 Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the Government within whose dominions he assumes to exercise it."

When a consul is appointed charge d'affaires, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as charge d'affaires and not as consul, and though authorized as consul to communicate directly with the Government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions 342, 345.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign Government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that Government, since he was

not recognized as performing any acts as such, which he was not equally competent to perform as consul general. 1 Whart. Dig. Int. Law, 2d ed. c. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, charge d'affaires ad interim of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.[1]

UNITED STATES v. HOFFMAN.

Supreme Court of the United States. 1866.

71 U. S. (4 Wallace) 158, 18 L. Ed. 354.

On a motion for prohibition.

At the last term of this court the relator made application for a writ of prohibition to the judge of the District Court of the Northern District of California, to prevent that court from proceeding further in a certain cause in admiralty. This court, without looking into the question of the alleged want of jurisdiction, granted a rule on the judge of that court to show cause why the writ should not be issued; and an order accompanied the rule, that he should proceed no further in the case until the decision of this court in the premises.

The return of the judge to that rule was now before this court. The substance of it was, that after the rule had been served upon him the libellant in the admiralty suit came into court, and moved for permission to pay all the costs that had accrued, and to dismiss his suit. After hearing argument the court granted the motion, and the libellant, having paid all the costs of both parties, an order was made dismissing the suit.

The relator now asked that the writ of prohibition might issue notwithstanding the return, and whether it should or not, presented the question to be here decided.

The suggestion of the relator, it may be here mentioned, stated

[1] Only a portion of the opinion is reprinted.—Ed.

that four other suits in admiralty against vessels owned by him, and founded on libels of the same character as the libel in this case, were pending in the same court. * * *

MR. JUSTICE MILLER delivered the opinion of the court.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction. In the case before us the writ, from its very nature, could do no more than forbid the judge of the District Court from proceeding any further in the case in admiralty.

The return shows that such an order is unnecessary, and will be wholly useless, for the case is not now pending before the court, and there is no reason to suppose that it will be in any manner revived or brought up again for action. The facts shown by the return negative such a presumption.

Counsel has argued very ingeniously that the case should be considered as remaining in the court below, in the same position as it was when the rule issued from this court; but we cannot so regard it. By the action of the libellant and the consent of the court, the case is out of court, and the relator is no longer harassed by an attempt to exercise over him a jurisdiction which he claims to be unwarranted. If the return shows no more, it shows that the district judge has no intention of proceeding further in that case. Now, ought the writ to issue to him under such circumstances? It would seem to be an offensive and useless exercise of authority for the court to order it.

The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases.

We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence.

Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court.

These views are supported by the following cases:

In United States v. Peters,[1] which was an application for prohibition to the admiralty, this court suspended its decision to give the libellant an opportunity to dismiss his libel. The court finally issued the writ, but there seems no reason to doubt, from the report of the case, that it would have considered such action by the libellant as an answer to the request for the writ.

In the case of Hall v. Norwood[2] a very old case, when writs of prohibition were much more common than now—a prohibition was asked to a court of the Cinque Ports at Dover. While the case was under consideration, the reporter says: "On the other hand the court was informed that they had proceeded to judgment and execution at Dover, and therefore that they move here too late for a prohibition, and of this opinion was the court, since there is no person to be prohibited, and possessions are never taken away or disturbed by prohibitions." The marginal note by the reporter is this: Prohibition will not lie after the cause is ended."

The rule heretofore granted in this case is

Discharged.

In re COOPER.

Supreme Court of the United States. 1892.

143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court. * * *

Section 688, Revised Statutes, provides: "The Supreme Court shall have power to issue writs of prohibition to the District Courts

1 3 Dallas 121.
2 Siderfin, 166.

when proceeding as courts of admiralty and maritime jurisdiction." * * *

The writ thus provided for by section 688 is the common law writ, which lies to a court of admiralty only when that court is acting in excess of, or is taking cognizance of matters not arising within, its jurisdiction. Its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities. Ex parte Gordon, 104 U. S. 515; Ex parte Ferry Company, 104 U. S. 519.

Whether the granting or refusal, of the writ is discretionary or demandable of right has been much debated.

As remarked by Mr. Justice GRAY in Smith v. Whitney, 116 U. S. 167, 173, it may be said to be discretionary, "where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error."

But it is clear upon reason and authority that where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ, which even if of right is not of course, is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it.[1]

CAPITAL TRACTION COMPANY v. HOF.

Supreme Court of the United States. 1899.

174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873.

MR. JUSTICE GRAY delivered the opinion of the court. * * *

III. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not

[1] Only a portion of the opinion is reprinted.—Ed.

merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.[1]

KENTUCKY v. POWERS.

Supreme Court of the United States. 1906.

201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633.

MR. JUSTICE HARLAN delivered the opinion of the court. * * *

What we have said is clear from section 709 of the Revised Statutes, which declares that "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, * * * where any title, right, privilege or immunity is claimed under the Constitution, * * * and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, * * * may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error." Looking at the object of that section it must be held that this court has jurisdiction, upon writ or error to reëxamine the final judgment of a subordinate State Court denying a Federal right, specially set up or claimed, if, under the local law, that court is the highest court of the State entitled to pass upon such claim of Federal right. The great case of Cohens v. Virginia, 6 Wheat. 264, which was a criminal prosecution for a misdemeanor, was brought to this court, upon writ of error, from the Quarterly Session Court for the Borough of Norfolk, Virginia, and our jurisdiction was sustained upon the ground that such court was the highest court of the State in which, under the laws of Virginia, that case was cognizable. In Downham v. Alexandria, 9 Wall. 659, which was a suit for taxes against a

[1] Only a small portion of the opinion is reprinted.—Ed.

dealer in liquors, the court said: "The Legislature, then, having thought fit to make the judgment of the District Court in this case final and without appeal, that court is, for this case, the highest court in which the decision could be made; and the writ of error is, therefore, warranted by the Act of Congress, and regular." In Gregory v. McVeigh, 23 Wall. 294, 306, which was a writ of error to the Corporation Court of Alexandria, Virginia, and in which there was a motion to dismiss for want of jurisdiction, this court said: "The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may reëxamine the judgment of the highest court which, under laws of the State, could decide it. * * * We think, therefore, that the judgment of the Corporation Court of the City of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may reexamine it upon error." In Bergemann v. Backer, 157 U. S. 655, 659, a criminal prosecution for murder in a subordinate court of New Jersey, this court said: "If the proceedings in the Court of Oyer and Terminer could not, under the laws of New Jersey, be reviewed in a higher court of that State, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the Acts of Congress, the judgment of the highest court of the State in which a determination of the case could be had, and such judgment could have been, upon writ of error, reëxamined here, if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States." So, in Missouri, Kansas, etc., Ry. Co. v. Elliott, 184 U. S. 530, 539, in which the defendant made a claim of immunity in virtue of an authority exercised under the United States, it was held that our writ of error ran, not to the Supreme Court of Missouri, but to the Kansas City Court of Appeals, the highest court in which, under the law of that State, the question as to that immunity could be decided.[1]

[1] Only a portion of the opinion is reprinted.

Compare Olney v. Arnold, 3 U. S. (3 Dallas) 308, 318, 1 L. Ed. 614, 618 (1796); Mullen v. Western Union Beef Company, 173 U. S. 116, 19 S. Ct. 404, 43 L. Ed. 635 (1899).

See also Stratton v Stratton, 239 U. S. 55, 36 S. Ct. 26, 60 L. Ed. 142 (1915) which holds, as it is set out in the syllabus, that a judgment of an

MR. JUSTICE MCKENNA, delivering the opinion in Ireland v. Woods, 246 U. S. 323, 38 S. Ct. 319, 62 L. Ed. 745 (1918) said, after explaining the difference in the uses made of writs of certiorari and writs of error, "The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the Federal question presented is real and substantial and an open one in this court, while the other (certiorari) is granted or refused in the exercise of the court's discretion."

AMERICAN SUGAR REFINING CO. v. NEW ORLEANS.

Supreme Court of the United States. 1901.

181 U. S. 277, 21 S. Ct. 646, 45 L. Ed. 859.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The jurisdiction of the Circuit Court rested on diverse citizenship, and not on any other ground, and had the Circuit Court of Appeals gone on and decided the case, its decision would have been final, and our interposition could only have been invoked by certiorari.

This was so notwithstanding one of the defenses was the unconstitutionality of the ordinance. Colorado Central Mining Co. v. Turck, 150 U. S. 138; Press Publishing Co. v. Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691. These, and many other cases to the same effect, related to the appellate jurisdiction of this court over the Court of Appeals under the sixth section of the Judiciary Act of March 3, 1891, but they necessarily involve consideration of our jurisdiction under the fifth section, and that of the Court of Appeals under the sixth section. By the fifth section appeals or writs of error may be taken from the District or Circuit Courts direct to this court in any case that "involves the construction or application of the Constitution of the United States;" "in which the constitutionality of any law of the United States, or the validity

intermediate Appellate State Court is not a final judgment of the State Court of last resort within the meaning of section 237, Judicial Code, if the highest court of the State has a discretionary power to review which has not been invoked and refused.

As to the meaning of "final," see Morgan v. Thompson, page 375 *supra*.—Ed.

or construction of any treaty made under its authority, is drawn in question;" "in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Section six provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review the final decisions of the District or Circuit courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States." The jurisdiction referred to is the jurisdiction of the Circuit Court, and as the judgment of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, it follows that the Court of Appeals has power to review the judgment of the Circuit Court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached, by reason whereof the case became embraced by section five.

Thus it was held in Loeb v. Columbia Township Trustees, 179 U. S. 472, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the State statute involved was claimed in defence to be in contravention of the Constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court.

The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the Courts of Appeals are not made final it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

And the right to two appeals would exist in every case (the

litigated matter having the requisite value), where the jurisdiction of the Circuit Court rested solely on the ground that the suit arose under the Constitution, laws or treaties of the United States, if such cases could be carried to the Circuit Court of Appeals, for their decisions would not come within the category of those made final.

As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States, Gold Washing & Water Co. v. Keyes, 96 U. S. 199; Blackburn v. Portland Gold Mining Co., 175 U. S. 571; Western Union Telegraph Co. v. Ann Arbor Railroad Company, 178 U. S. 239; and as those cases fall strictly within the terms of section five, the appellate jurisdiction of this court in respect of them is exclusive.

If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in Colorado Central Mining Co. v. Turck, 150 U. S. 138, and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. Union Pacific Railway Company v. Harris, 158 U. S. 326.

In Carter v. Roberts, 177 U. S. 496, we said: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the con-

stitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the Circuit Court of Appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in section five may have so arisen that a direct resort to this court might be had does not deprive the Court of Appeals of jurisdiction or justify it in declining to exercise it.

In the case at bar, the jurisdiction rested on diverse citizenship. Two defences were interposed, one of which asserted exemption from the license tax, and the other denied the constitutionality of the legislation under which the tax was imposed.

Both defences were overruled, and judgment rendered for the plaintiff. The case was then carried on error to the Circuit Court of Appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a certiorari should issue that its judgment to that effect may be revised. As the record is before us on the return to the rule hereinbefore entered, and full argument has been had, it will be necessary for another return to be made to the writ, or further argument to be submitted.

Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause.

MR. JUSTICE GRAY concurred in the result.[1]

[1] The facts are omitted.

As to the meaning of "final," see Morgan v. Thompson, page 375, *supra*.

As to when a case involves the construction or application of the Constitution of the United States, etc., see St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., page 81, *supra;* United States Fidelity & G. Co. v. State of Oklahoma, 250 U. S. 111, 39 St. Ct. 399, 62 L. Ed.—(1919); Rust Land & Lumber Co. v. Jackson, 250 U. S. 71, 39 S. Ct. 424, 425, 63 L. Ed. (1919).—Ed.

CHICAGO, B. & Q. RY. v. WILLIAMS.

Supreme Court of the United States. 1907.

205 U. S. 444, 27 S. Ct. 559, 51 L. Ed. 875.

MR. JUSTICE HARLAN, after stating the facts, delivered the opinion of the court.

In Jewell v. McKnight, 123 U. S. 426, 432, 434, 435, the court had occasion to determine the scope of those provisions of the Revised Statutes which authorized the judges of the Circuit Court in any civil suit or proceeding before it where they were divided in opinion, to certify to this court the point upon which they so disagreed. Rev. Stat., §§ 650, 652, 693. Speaking by Mr. Justice GRAY, this court held that each question certified must be a distinct point or proposition of law clearly stated, so that it could be definitely answered, without regard to other issues of law or of fact in the case. It said: "The points certified must be questions of law only, and not questions of fact, or of mixed law and fact—'not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony of facts adduced in cause.' * * * The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division." In that case the general creditors of one of the parties sought to set aside, as fraudulent, a warrant of attorney to confess judgment. The court further said: "The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call 'the facts found' is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found. The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or mixed law and fact. * * * Not one of the ques-

tions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all circumstances of the case. * * * 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;' and 'It is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the Circuit judges of the difficulties they have found in doing so.' Waterville v. Van Slyke, 116 U. S. 699, 704." See also Fire Asso. v. Wickham, 128 U. S. 426, 434.

In United States v. Rider, 163 U. S. 132, the Chief Justice, speaking for the court, said that "it has always been held that the whole case could not be certified," and that "under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference of opinion was entirely obviated." In that case it was also held that certificates of questions of law by the Circuit Courts of Appeals under the Judiciary Act of March 3, 1891, are governed by the same general rules as were formerly applied to certificates of division of opinion in the Circuit Court—citing Columbus Watch Co. v. Robbins, 148 U. S. 266; Maynard v. Hecht, 151 U. S. 324.

In United States v. Union Pacific Railway, 158 U. S. 505, 512 (which was the case of certified questions from a Circuit Court of Appeals), the rule as announced in the Rider case was affirmed. To the same effect are Graver v. Faurot, 162 U. S. 435, 436; Cross v. Evans, 167 U. S. 60, 64; McHenry v. Alford, 168 U. S. 651, 658.

The present certificate brings to us a question of mixed law and fact, and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises. The question certified is rather a condensed, argumentative narrative of the facts upon which, in the opinion of the judges of the Circuit Court of Appeals, depends the validity of the live-stock contract in suit. Thus, practically, the whole case is brought here by the certified question, and we are, in effect, asked to indicate what, under all the facts stated, should be the final judgment. It is, obviously, as if the court had been asked, generally, upon a statement of all the facts, to determine what, upon those facts, is the law of the case. We thus state the matter, because it is apparent that the case turns altogether upon the question propounded as to the validity, in view of all the facts stated, of the contract

under which the plaintiff's cattle were transported. This court is without jurisdiction to answer the question certified in its present imperfect form and the certificate must be dismissed. Sadler v. Hoover, 7 How. 646.

It is so ordered.

MR. JUSTICE BREWER dissented.[1]

CELLA v. BROWN.

Circuit Court of Appeals, Eighth Circuit. 1906.

144 Fed. 742, 75 C. C. A. 608.

ON REHEARING.

Per Curiam.—The request to certify the jurisdictional question involved to the Supreme Court under Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), establishing United States Circuit Courts of Appeals, must be denied for two reasons:

First. Questions should not be certified after the case has been decided. Louisville N. A. & C. Ry. v. Pope, 20 C. C. A. 253, 74 Fed. 1; Andrews v. National F. & P. Works, 23 C. C. A. 454, 77 Fed. 774, 36 L. R. A. 153. In the first-cited case Judge JENKINS, speaking for the United States Circuit Court of Appeals for the Seventh Circuit, in which a similar motion was made, said:

"Whether a question should be certified rests within the discretion of the court, but it is not a discretion the exercise of which may be invoked by a party of right. The certification is for the instruction of the court upon doubtful questions; and while in cases of magnitude and upon intricate and doubtful questions of law the court upon the argument may perhaps properly indulge the suggestion of counsel of the desirability of the advice and in-

1 Only a portion of the opinion is reprinted.

In Quinlan v. Green County, 205 U. S. 410, 27 S. Ct. 505, 51 L. Ed. 860 (1907), Mr. Justice Moody said, "The first question certified is thought by a majority of the court to contain more than a single question or proposition of law, and for that reason it is not answered."

"A certificate of questions or propositions of law concerning which a Circuit Court of Appeals desires the instruction of this court for their proper decision is irregular when a quorum of its members does not sit in the case * * *" Cincinnati, Hamilton and Dayton Railroad v. McKeen, 149 U. S. 259, 13 S. Ct. 840, 37 L. Ed. 725.—ED.

struction of the Supreme Court, we are compelled to say that this formal motion is not conformable to correct practice. It cannot be tolerated that the argument of a cause may be thus split up into sections. If the suggestion of counsel may be entertained that a question in the cause should for any reason be certified, the suggestion must come at the argument of the case upon its merits, when the court can be fully advised whether the questions involved are so intricate and doubtful and essential to be resolved that the instruction of the Supreme Court is necessary or desirable. If the present motion were entertained, it would furnish a precedent for a practice that would seriously interfere, with the proper dispatch of the business of the court. It may be that upon the argument of the cause upon its merits some question may be raised which, upon consultation, the judges may deem proper to certify. We shall reserve the right and discretion so to do if and when we deem it needful to the proper determination of the cause. We must decline at this time to entertain the motion, or to recognize the right of a party to challenge our judgment upon the propriety of so doing in advance of the argument of the case upon its merits. The motion to certify certain questions to the Supreme Court is overruled."

A petition to the Supreme Court for certiorari in the Andrews Case was denied. 166 U. S. 721, 17 Sup. Ct. 996, 41 L. Ed. 1188.

Second. It is only in cases of grave doubt that questions should be certified to the Supreme Court. Fabre v. Cunard Steamship Co., 8 C. C. A. 199, 59 Fed. 500; the Horace B. Parker, 20 C. C. A. 572, 74 Fed. 640. The questions involved in this case are not of that nature.

The motion for a rehearing, as well as the petition to certify the question of jurisdiction to the Supreme Court, is overruled.[1]

LAU OW BEW v. UNITED STATES.

Supreme Court of the United States. 1892.

144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

* * *

In every case within its appellate jurisdiction, the Circuit Court of Appeals may certify to this court any question or proposition

[1] Only a portion of the opinion is reprinted.—Ed.

of law in respect of which it desires instruction, and this court may then require the whole record and cause to be sent up; and so it is competent for this court by certiorari to direct any case to be certified, whether its advice is requested or not, except those which may be brought here by appeal or writ of error, and the latter are specified as those where the money value exceeds a certain amount, and which have not been made final "in this section," that is, made final in terms. And as certiorari will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision, the object of the act is thereby attained.[1]

LAU OW BEW v. UNITED STATES.

Circuit Court of Appeals, Ninth Circuit. 1891.

47 Fed. 641, 1 C. C. A. 1.

Per Curiam.—It is conceded by counsel for the appellant that in the case of Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. Rep. 729, the Supreme Court decided the point involved in the present appeal adversely to the appellant. Nevertheless we are asked, by virtue of the sixth section of the act creating this court, to certify the case to the Supreme Court for instructions, upon the ground, as is claimed, that that court might have decided the case of Wan Shing v. U. S., the same way for other reasons than those assigned as the basis of the decision, and because in that case the attention of the court was not called to certain provisions of the act of Congress, the consideration of which, it is claimed, would have wrought a different result. There is nothing in the opinion of the court to indicate that its attention was not called to the clauses of the act referred to. The precise point was decided, and we are bound to presume that every provision of the law bearing upon the subject was considered by the court. We cannot put ourselves in the attitude of asking instructions upon a point already decided. If, as is contended on the part of the appellant, the case of Wan Shing v. U. S., was not fully presented to the court; and if, as is said, the treasury department of the Government, in enforcing the provisions of the act of Congress involved in Wan Shing's

[1] Only a portion of the case is reprinted.—Ed.

Case, is giving it a different construction from that given by the court whose province it is to construe and declare its meaning, under the belief that the court did not really intend to decide what it did decide; or if, for any cause, the Supreme Court may wish to reconsider the question,—an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this court there is nothing to do but to affirm the judgment on the authority of the case cited, and it is ordered accordingly.[1]

HUGULEY MFG. CO. v. GALETON COTTON MILLS.

Supreme Court of the United States. 1902.

184 U. S. 290, 22 S. Ct. 452, 46 L. Ed. 546.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court. * * * In all cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by certiorari or otherwise." The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be *ejusdem generis* with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.[2]

KIRWAN v. MURPHY.

Supreme Court of the United States. 1898.

170 U. S. 205, 18 S. Ct. 592, 42 L. Ed. 1009.

In this case an interlocutory order was made by the Circuit Court of the United States for the District of Minnesota for the

1 The facts are omitted.

But there may be a certification, if prior decision of the Supreme Court upon the point involved was by an equally divided court. Hertz v. Woodman, 218 U. S. 205, 213-214, 30 S. Ct. 621, 623, 54 L. Ed. 1001, 1005 (1910).—Ed.

2 Only a small portion of the opinion is reprinted.

For discussion of the time within which the writ of certiorari will issue under section 240 of the Judicial Code, see Hughes' Federal Procedure (2d Ed.), page 519.—Ed.

issue of a temporary injunction. There was an appeal to the Circuit Court of Appeals, which affirmed the decision of the lower court. An order was issued for a temporary injunction. An appeal from this order was taken to this court.[1]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

By the sixth section of the Act of March 3, 1891, c. 517, 26 Stat. 826, the judgments or decrees of the Circuit Court of Appeals are made final in that court in the classes of cases therein enumerated of which the present is not one, and it is provided that in all cases not made final, there shall be of right, within one year, an appeal or writ or review of the case by this court, where the matter in controversy exceeds one thousand dollars exclusive of costs.

But this applies only to final orders, judgments or decrees. Young v. Grundy, 6 Cranch 51; Keystone Iron Company v. Martin, 132 U. S. 91; McLish v. Roff, 141 U. S. 661; American Construction Company v. Jacksonville Railway Company, 148 U. S. 372, 378.

The order sought to be reviewed was simply an interlocutory order of the Circuit Court for the issues of a temporary injunction, which order was affirmed by the Circuit Court of Appeals without direction. If we should take jurisdiction, it is this order we should revise in also reviewing that of the Circuit Court of Appeals, and our mandate would go directly to the Circuit Court. Louisville & Nashville Railroad v. Behlmer, 169 U. S. 644.

In Smith v. Vulcan Iron Works, 165 U. S. 518, it was held that the Circuit Courts of Appeals on an appeal from an interlocutory order or decree of the Circuit courts granting an injunction and ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill; and this course might be pursued in other cases. Mills v. Green, 159 U. S. 651. Here, however, the Court of Appeals did not finally determine the case by its judgment, and whether the temporary injunction should be made permanent or not, was left to the Circuit Court to decide when the final decree was entered.

And we may add, that in concluding its opinion, the Circuit Court of Appeals said: "In view of these considerations, we are

[1] The facts are restated.—Ed.

not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed." 49 U. S. App. 658.

Moreover, by section six, the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit courts, except where cases are carried, under section five, directly to this court, but, by the seventh section, as amended by the Act of February 19, 1895, 28 Stat. 666, c. 96, jurisdiction is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. And it was under that section that the appeal was taken to the Court of Appeals in this case.

But there is no provision in the Act of March 3, 1891, or any other act, authorizing an appeal to this court from interlocutory orders or decrees, and whether certiorari would lie is a question that does not arise. In re Tampa Suburban Railroad Company, 168 U. S. 583.

Appeal dismissed.

RYAN v. BINDLEY.

Supreme Courts of the United States. 1863.

68 U. S. (1 Wallace) 66, 17 L. Ed. 559.

MR. JUSTICE DAVIS delivered the opinion of the court:

1. The allegation in the declaration must be taken, generally, as fixing the amount or value for the purposes of jurisdiction. But the subsequent pleadings may so change the original character of the suit as to involve an amount or value in excess of two thousand dollars, and when this is done, the judgments and decrees of the court below are subject to be reviewed here.

In this case Ryan interposed a notice of set-off, and insisted that Bindley owed him four thousand dollars, for goods sold and money lent, which he claimed the right to set off against Bindley's demand, and to recover against Bindley a judgment for the excess. By the laws of Ohio a defence is permitted, and if the defendant succeeds in proving his set-off, and it is larger than the plaintiff's claim, he is entitled to a judgment for the excess. The parties are concluded by the judgment, and cannot again litigate the

same subject-matter, unless the judgment should be reversed, on appeal or writ of error to the Supreme Court. This law of set-off, or counter claim, and the practice under it, has been adopted as a rule of court, by the Circuit Court of the United States for the districts of Ohio. The plea in this case was therefore proper, and after it was interposed the matter in dispute rightfully exceeded the sum of two thousand dollars, exclusive of costs, and as the plaintiff had judgment, it is plain that the defendant had the right to sue out his writ of error.[1]

SAMPSON v. WELSH.

Supreme Court of the United States. 1860.

65 U. S. (24 Howard) 207, 16 L. Ed. 632.

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

This case is brought up by an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

A libel was filed in the District Court for that district by S. & W. Welsh, the appellees, against the ship Sarah (of which Sampson & Tappan, appellants, are the owners), to recover compensation for damages sustained by a cargo of coffee shipped on board the Sarah, at Rio, and consigned to the libellants; and also to recover compensation for sundry disbursements made by the libellants for the payment of wages and provisions for the ship.

The ship-owners appeared, and answered; but it is unnecessary to state more particularly the facts in controversy between the parties, because the final decree of the Circuit Court was for less than two thousand dollars, and consequently no appeal from its decree will lie to this court.

At the hearing in the District Court the libel was dismissed; but upon an appeal to the Circuit Court this decision was reversed, and a decree passed by the Circuit Court in favor of the libellants for the sum of $2,302.78 with leave to the respondents

[1] Only a portion of the opinion is reprinted.

As to the effect of a counter claim, see Block v. Darling, 140 U. S. 234, 237-238, 11 S. Ct. 832, 833, 35 L. Ed. 476, 478 (1891).

Compare Bradstreet v. Higgins, 112 U. S. 227, 5 S. Ct. 117, 28 L. Ed. 715 (1884).—Ed.

to set off the balance due them for freight, if they should elect to do so. Afterwards, the respondents appeared in court, and elected to set off this balance against the sum decreed against them, which reduced the amount to $1,071.27. But in making this election, the proctors for the respondents stated in writing, and filed in the court, that the election to set off was made without any waiver of their right to appeal from the decree. After this election was made, the court, on the 31st of August, 1858, passed its decree in favor of the libellants for the above-mentioned sum of $1,071.27, with interest from July 20, 1858. This was the final decree of the court, and the one from which the appeal is taken; and as it is below $2,000, no appeal will lie under the act of Congress. And neither the reservation of the respondents in making their election, nor even the consent of both parties, if that had appeared, will give jurisdiction to this court where it is not given by law.

The appeal must therefore be dismissed for want of jurisdiction.[1]

UNITED STATES v. GRANT.

Supreme Court of the United States. 1884.

110 U. S. 225, 3 S. Ct. 585, 28 L. Ed. 127.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Grant & Co. sued the United States in the Court of Claims on the 2d of December, 1868, and on the 6th of December, 1869, recovered a judgment for $34,225.14. On the 5th of January, 1883, the following act was passed by Congress:

"Be it enacted * * * That the Court of Claims be, and it is hereby, directed to reopen and readjudicate the case of Albert Grant and Darius Jackson * * * upon the evidence heretofore submitted to the said court in said cause * * *, and if said court in such readjudication shall find from such evidence that the court gave judgment for a different sum than the evidence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and

[1] Only the opinion is reprinted.—Ed.

sixteen dollars and twenty-nine cents; and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the Fifth Court of Claims report, page eighty."

Under this act Grant, on the 13th day of January, 1883, applied to the court to re-examine the case and to render a judgment *nunc pro tunc* for the additional sum of $14,016.29. Upon this application, the court, on due consideration, found that the original judgment was given for a different sum than was intended, and that, "in order to correct such error and adjudge to said Albert Grant such additional sum in this cause as the evidence justifies, he should receive a further sum of $14,016.29," and on the 11th of June, 1883, a judgment for that amount was rendered. From this judgment the United States took an appeal, which Grant now moves to dismiss on the ground that no appeal lies from an order or judgment entered in such a proceeding.

In our opinion, this motion should be granted. The act of Congress, in its legal effect, is nothing more than a direction to the Court of Claims to entertain an application to correct an error in the entry of one of its former judgments. The readjudication ordered is to be upon the old evidence, and, if an error is found, the correction is to be made, not by rendering a new judgment, but by amending the old one. The language is, "and the amount by readjudication in favor of the said Albert Grant shall be a part of the original judgment." As, when the act was passed, an appeal from the original judgment was barred by lapse of time, we are satisfied it was the intention of Congress to make the action of the Court of Claims upon this readjudication final. Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate that the new part of the judgment can be separated from the old for the purposes of review here. By the correction the new judgment was merged in the old.

The motion to dismiss is granted.

UNITED STATES v. ELLICOTT.

Supreme Court of the United States. 1912.

223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535.

The United States appealed to the Supreme Court of the United States from the judgment of the Court of Claims.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.
* * *

A motion to dismiss the appeal first requires attention. The facts are as follows:

The judgment against the United States was entered on May 18, 1908. Eighty-four days afterwards, on August 10, 1908, defendant filed a motion for a new trial. This motion was argued and submitted on November 23, 1908, and was overruled on January 4, 1909, in the term which began on December 7, 1908. Seventeen days afterwards, on January 21, 1909, the United States filed a motion to amend the findings of fact; on February 8, 1909, the motion was argued and submitted; and on February 15, 1909, the motion was overruled in part and allowed in part. Ten days afterwards, on February 25, 1909, the United States made application for and gave notice of an appeal "from the judgment rendered in the above entitled cause on the fourth day of January, 1909."

The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment (Rev. Stat., § 708), and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, "but was merely from the order overruling the motion for a new trial."

The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the Court of Claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purpose of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. Kingman v. Western Manufacturing Company, 170 U. S. 675, 680, 681. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of. Texas & Pacific Railway Company v. Murphy, 111 U. S. 488.[1]

[1] Only a portion of the opinion is reprinted.
Compare Henry v. Merguire, 111 Cal. 1, 43 Pac. 387 (1896).—Ed.

HOLDEN v. STRATTON.

Supreme Court of the United States. 1903.

191 U. S. 115, 24 S. Ct. 45, 48 L. Ed. 116.

Two separate proceedings were commenced in the District Court of the United States for the District of Washington, on January 19, 1901, against D. N. Holden and Lizzie Holden, to the end that each be adjudicated a bankrupt, which were consolidated, and on the ensuing twenty-fifth of February they were, respectively, so adjudicated. The creditors of each of the bankrupts were the same.

Thereupon J. A. Stratton was duly elected trustee in bankruptcy of the estate of each of the bankrupts and qualified as such. The bankrupts, and each of them, applied for exemption in their favor of two certain policies of life insurance in the hands of the trustee. D. N. Holden was insured, and Lizzie Holden was the beneficiary, in both, with the provision that if she should survive him, payment should be made to his executors, administrators and assigns.

The exemption was disallowed by the referee, who reported his action to the court. The bankrupts filed exceptions to the report, and the court on July 16, 1901, set it aside and adjudged the policies to be exempt. Stratton then filed a petition in the Circuit Court of Appeals for the Ninth Circuit for a revision of this order. It was therein alleged among other things that the policies had a present cash surrender value combined of about twenty-two hundred dollars. The Circuit Court of Appeals, accepting the ruling of that court in the previous case of In re Scheld, 104 Fed. 870, held that the policies were not exempt, and decreed a revision of the order of the District Court accordingly. 113 Fed. Rep. 141. From this decree an appeal was prayed to this court and allowed February 12, 1902, and the record was filed here April 14, 1902. And subsequently a certificate of a justice of this court was filed herein that in his opinion the determination of the questions involved was essential to a uniform construction of the bankruptcy act throughout the United States.

The appeal was submitted on a motion to dismiss, and also on the merits.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

It will be perceived that the jurisdiction of the Circuit Court of Appeals was invoked on an original petition under section 24b of the bankruptcy law, which provides: "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

This supervisory jurisdiction in matter of law was conferred on the Circuit courts by the Act of March 2, 1867, 14 Stat. 517, 518, c. 176, § 2; Rev. Stat. § 4986, and it was settled under that act that appeals to this court did not lie from the decisions of the Circuit courts in the exercise of that jurisdiction. Morgan v. Thornhill, 11 Wall. 65; Conro v. Crane, 94 U. S. 441. The ruling is decisive here unless the present act elsewhere otherwise provides. But this it does not do, the special and summary character of the revision contemplated being substantially the same as in the prior act, and the provision for appeals not embracing appeals from decrees in revision.

Section 25a, 30 Stat. 544, c. 541, July 1, 1898, provides "that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

And section 25b for appeals to this court "from any final decision of a Court of Appeals, allowing or rejecting a claim under this act," where the amount in controversy exceeds the sum of two thousand dollars, and the question involved was one which might have been taken from the highest court of a State to the Supreme Court of the United States; or where some justice of the Supreme Court certifies that "in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

This case was not taken to the Court of Appeals by appeal, as in equity cases, to be re-examined on the facts as well as the law,

nor could it have been, for it was not one of the cases enumerated in section 25a. The order of the Circuit Court was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," or the revising of the Circuit Court of Appeals, "a final decision, allowing or rejecting a claim," within the intent and meaning of either subdivision a or b. By section 2, subd. 2, courts of bankruptcy are vested with the power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;" and section fifty-seven comprehensively covers the subject of the proof and allowance of claims, treating them as moneyed demands.

And while the word "claim" is used in its signification of the demand or assertion of a right in subd. 11 of section 2, in respect of "all claims of bankrupt to their exemptions," it is also used in many parts of the act, and, as we think, in section 25, as referring to debts (which by sub-sec. 11 of section 1 include "any debt, demand or claim provable in bankruptcy"), presented for proof against estates in bankruptcy. Hutchinson v. Otis, 190 U. S. 552, 555; In re Whitener, 105 Fed. Rep. 180; In re Columbia Real Estate Co., 112 Fed. Rep. 643, 645.

The allowance or rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and under the Act of 1867 it was held that this court had no jurisdiction to review judgments of the Circuit courts dealing with the action of the District courts in such allowance or rejection because they were not final. Wiswall v. Campbell, 93 U. S. 347; Leggett v. Allen, 110 U. S. 741. The jurisdiction now given is carefully restricted and cannot be expanded beyond the letter of the grant. It is an exception to the general rule as to appeals and writs of error obtaining from the foundation of our judicial system. McLish v. Roff, 141 U. S. 661.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24 and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. Denver First National Bank v. Klug, 186 U. S. 202; Elliott v. Toeppner, 187 U. S. 327, 333, 334.

Section 6 of the Act of March 3, 1891, has no application, as that refers to cases carried to the Circuit Court of Appeals by appeal or writ of error. But in view of the terms of that act and of the nature of the writ, we have held that under a reasonable

construction of subdivision d of section 25, certiorari lies to decrees in revision. Bryan v. Berheimer, 175 U. S. 724; S. C., 181 U. S. 188; Mueller v. Nugent, 180 U. S. 640; S. C., 184 U. S. 1; Louisville Trust Co. v. Comingor, 181 U. S. 620; S. C., 184 U. S. 18. In the case first cited it is pointed out that the Circuit Court of Appeals treated the case as if before it on a petition for revision though it had been carried there by appeal, and we considered the decree as rendered in the exercise of the supervisory power. 181 U. S. 192, 193.

Appeal dismissed.[1]

[1] For a further discussion of section 252 of the Judicial Code, see Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 S. Ct. 25, 54 L. Ed. 1047 (1910); Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 32 S. Ct. 67, 56 L. Ed. 118 (1911).—Ed.

CHAPTER V.

PROVISIONS COMMON TO MORE THAN ONE COURT.

SECTION I.

Definitions.

GOODING v. REID, MURDOCK & CO.

Circuit Court of Appeals, Seventh Circuit. 1910.

177 Fed. 684, 101 C. C. A. 310.

Grosscup, Circuit Judge, after stating the facts, delivered the opinion.

The equity suit, in which the writ of *ne exeat* was issued, is still pending. The immediate action at law for false imprisonment, growing out of the execution of the writ, can and ought to be enjoined; and this question depends largely on whether, as an appropriate process of furthering the jurisdiction and orders of the equity suit, the issuance of a writ of *ne exeat* is *coram non judice.*

The chief arguments made against the writ are, that it amounts to imprisonment for debt, and that there is no imprisonment for debt in Illinois; that it will be issued only when the demand sought to be enforced is certain in its nature, actually payable, and not contingent; and that it will not be issued in an action for an accounting, unless there is an admitted balance due by the defendant to the plaintiff; all of which arguments, except the first, challenge not the jurisdiction of the court to issue, but the sufficiency of the case made out in such court to call for the exercise of its jurisdiction, and are therefore immaterial here, because this is not an appeal from the order issuing the writ, nor from the order denying the motion to quash the writ, nor from any order involving appellant's right to an assessment of damages in the equity suit, on account of the issuance of the writ, but an appeal from

an order that forbids appellant from going into any court other than the court from which the writ was issued, to determine these questions. And granted that the court had jurisdiction to issue the writ, and that it had power to protect this jurisdiction so as to make it all inclusive of the questions that might arise thereunder, including the question of damages; these questions are not questions that arise on this appeal.

(1) Did the equity court have power, as an appropriate process toward preserving the property brought by the bill within its jurisdiction, compelling a delivery to the receiver, and to prevent an evasion of its order, to issue the writ? We think it did. The constitutional provision regarding imprisonment for debt does not prohibit the exercise of equitable process for the purposes named. Dean v. Smith, 23 Wis. 483, 99 Am. Dec. 198. The writ is one of right (2 Story's Eq. Jurisp. [10th. Ed.] § 1469), and, as said in the preface to Warner's 1st Am. Ed. of Beames' Ne Exeat Regno, is little more than an order to hold to equitable bail, the party generally getting rid of it by giving security to abide the event of the litigation. And in a number of cases in this country, as an appropriate equitable process, the writ has been utilized and sustained. Patterson v. McLaughlin, 1 Cranch, C. C. 352, Fed. Cas. No. 10,828; Union Mutual Life Ins. Co. v. Kellogg, 24 Fed. Cas. 611, No. 14,373; In re Rosser, 101 Fed. 562, 41 C. C. A. 497; Dean v. Smith, *supra.*

In Enos v. Hunter, 4 Gilman (Ill.) 211, it was said:

"Where the relief sought could be effected by acting directly upon the person of the defendant, the court of chancery has never hesitated to entertain the bill where the defendant is found within its jurisdiction, whether the subject-matter of the controversy be within its control or not. Of this character are those cases where the courts have compelled specific performance of contracts for the conveyance of, or relating to land which is situated beyond its jurisdiction. And in such cases the court will compel a conveyance to be executed, in such manner and form as may be prescribed by the law of the country where the land is situate. And if need be, in order to effect this, they will prevent the defendant from leaving the jurisdiction of the court, *pendente lite,* by a writ of *ne exeat.*

In Mitford & Tyler's Pl. and Pr. in Equity, p. 144, it is said:

"For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a

special order on the subject, or issues a provisional writ; as * * * the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demands by quitting the Kingdom."

In a note to section 865, Gibson's Suits in Chancery (1907), it is said:

"It would seem that a *ne exeat* is a writ necessary for the purposes of justice when the defendant, by leaving the State, can defeat the power of the court to grant effectual relief, or evade the relief granted; especially when the relief consists in compelling the defendant (1) to execute to the complainant a deed for land, or other property, situate in another State, or * * * (4) to do some other act which the court could not effectually do by the direct and inherent operation of its own decree. The object of the writ is to enable the court to act upon the person of the defendant in such cases. 1 Barb. Ch. P. 647, 651, 652; 2 Dan. Ch. Pr. 1698, note; 2 Sto. Eq. Jur. §§ 1471, 1472, note."

That the writ was not *coram non judice,* seems clearly, by these authorities, to be established.[1]

SCIRE FACIAS.

4 Words and Phrases (2nd Series) 483, 484.

"Scire facias" is a judicial writ at common law to revive judgments, or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered. Egan v. Chicago Great Western Ry. Co., 164 Fed. 344, 350.[2]

1 Only a portion of the opinion is reprinted.—Ed.

2 For a further discussion of "scire facias" see the other references in 4 Words and Phrases (2nd Series), 483-485.

For a good collection of cases dealing with the remainder of section 262 of the Judicial Code, see 2 U. S. Comp. Stat. (Annotated) 1916, 1893-1912.

See also 2 U. S. Comp. Stat. (Annotated) 1916, 1917-1962, for a discussion of sections 264-266 of the Judicial Code which cannot be taken up in this book.

It may be noted here that cases on section 267 of the Judicial Code are omitted for the question involved therein is ordinarily, if not always, thoroughly discussed in courses in equity.—ED.

SECTION II.

CONTEMPTS.

SAVIN, PETITIONER.

Supreme Court of the United States. 1889.

131 U. S. 267, 9 S. Ct. 699, 33 L. Ed. 150.

Flores, we have seen, was in attendance upon the court in obedience in behalf of one of the parties to a case then being tried. While he was so in attendance, and when in the jury-room, temporarily used as a witness-room, the appellant endeavored to deter him from testifying in favor of the Government in whose behalf he had been summoned; and, on the same occasion, and while the witness was in the hallway of the courtroom, the appellant offered him money not to testify against Goujon, the defendant in that case. Was not this such misbehavior upon the part of the appellant as made him liable, under § 725, to fine or imprisonment, at the discretion of the court? This question cannot reasonably receive any other than an affirmative answer. The jury-room and hallway, where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions. It was held in Heard v. Pierce, 8 Cush. 338, 341, that "the grand jury, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court, precisely as the witnesses testifying before the petit jury are amenable to the court." Bacon, in his essay on Judicature (No. LVI), says: "The place of justice is an hallowed place; and therefore not only the bench but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption." We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in

any form," Ex parte Terry, 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not effect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court. If, while Flores was in the courtroom, waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the Government, or had there offered him money not to testify against Goujon, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway just outside of the courtroom, or in the witness-room, where Flores was waiting, in obedience to the subpoena served upon him, or pursuant to the order of the court, to be called into the courtroom as a witness, must it be said that such misbehavior was not in the presence of the court? Clearly not.[1]

[1] Only a portion of the opinion is reprinted.
See also United States v. Carter, 25 Fed. Cas. No. 14,740, p. 313, 3 Cranch, C. C. 423 (1829); United States v. Emerson, 25 Fed. Cas. No. 15,050, p. 1012, 4 Cranch, C. C. 188 (1831); Toledo Newspaper Co. v. United States, 237 Fed. 986, 991-993, 150 C. C. A. 636, 641-643 (1916); In re Independent Pub. Co., 240 Fed. 849, 852-858, 153 C. C. A. 535, 538-544 (1917).—Ed.

CHAPTER VI.

CONCURRENT JURISDICTION.

SECTION I.

RIGHTS OF STATE AND FEDERAL COURTS HAVING CONCURRENT JURISDICTION.

BALTIMORE & O. R. CO. v. WABASH R. CO.

Circuit Court of Appeals, Seventh Circuit. 1902.

119 Fed. 678, 57 C. C. A. 417.

JENKINS, Circuit Judge (after stating the facts).—It is settled that, when a State Court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted. Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399; Farmers' Loan & Trust Co. v. Lake Street El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. We have followed this rule, declaring "that the court which first obtains possession of the *res* or of the controversy, by priority in the service of its process, acquires exclusive jurisdiction for all the purposes of a complete adjudication." 505,000 Feet of Lumber, 24 U. S. App. 509, 517, 12 C. C. A. 628, 65 Fed. 236. The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between State courts and those of the United States it is something more. "It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience." Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court; but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or

liquidate insolvent estates, and in all suits of a like nature. Farmers' Loan & Trust Co. v. Lake Street El. R. Co., *supra;* Merritt v. Steel Barge Co., 24 C. C. A. 530, 79 Fed. 228, 49 U. S. App. 85. The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly *in personam,* in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law. Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; 8 Rose, Notes, 1010. The doctrine is lucidly stated by Judge THAYER in Merritt v. Steel Barge Co., *supra.*[1]

BUCK v. COLBATH.

Supreme Court of the United States. 1865.

70 U. S. (3 Wallace) 334, 18 L. Ed. 257.

Colbath sued Buck in one of the State courts of Minnesota, in an action of trespass for taking goods. Buck pleaded in defence, that he was marshal of the United States for the District of Minnesota, and that having in his hands a writ of attachment against certain parties whom he named, he levied the same upon the goods, for taking which he was now sued by Colbath. But he did not aver that they were the goods of the defendants in the writ of attachment. * * *

Upon the merits of the case, the plaintiff in error relies mainly on the case of Freeman v. Howe, decided by this court, and upon the opinion by which the court sustained the decision.

That was a case like this in every particular, with the single

[1] Only a portion of the opinion is reprinted.

Wolverton, District Judge, said, in Knudsen v. First Trust & Savings Bank, 245 F. 81, 57 C. C. A. 377 (1917), "Where the controversy is the same in actions pending in courts of concurrent jurisdiction and the parties are the same, the general rule, supported by the weight of authority, seems to be that the court first acquiring jurisdiction of the controversy, will retain it to the exclusion of the other, though possession of the res be not taken, through a receiver or otherwise."—Ed.

exception, that when the marshal had levied the writ of attachment on certain property, a writ of replevin was instituted against him in the State Court, and the property taken out of his possession; while in the present case the officer is sued in trespass for the wrongful seizure.

In that case it was held, that although the writ of attachment had been wrongfully levied upon the property of a party not named in the writ, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction.

It must be confessed that this decision took the profession generally by surprise, overruling, as it did, the unanimous opinion of the Supreme Court of Massachusetts—a court whose opinions are always entitled to great consideration—as well as the opinion of Chancellor Kent, as expressed in his Commentaries.[1]

We are, however, entirely satisfied with it, and with the principle upon which it is founded; a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in Taylor v. Caryl,[2] and Hogan v. Lucas,[3] both of which assert substantially the same doctrine.

A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequence of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit.

This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the

1 Vol. ii, 410.
2 20 Howard 583.
3 10 Peters 400.

process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.

It is upon this ground that the court, in Day v. Gallup, held that this court had no jurisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued, and we held that such a suit in the State Court commenced after the proceedings in the Federal Court had been concluded, raised no question for the jurisdiction of this court.

It is obvious that the action of trespass against the marshal in the case before us does not interfere with the principle thus laid down and limited. The Federal Court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied, without any disturbance of its proceedings, or any contempt of its process. While at the same time, the State Court could proceed to determine the question before it involved in the suit against the marshal, without interfering with the possession of the property in dispute.[4]

LEWIS v. THE ORPHEUS.

District Court, D. Massachusetts. 1858.

15 Fed. Cas. No. 8,330, p. 492, 3 Ware 143.

WARE, District Judge.—The first question which arises in these cases is whether the court has jurisdiction. The right of the court to take cognizance of the subject-matter is not questionable; but

[4] Some of the facts are omitted, and only a portion of the opinion is reprinted.

See, for further examples of this doctrine, Montgomery v. M'Dermott, 87 Fed. 374, 376-377 (1898); Hubinger v. Central Trust Co., 94 Fed. 788, 790-791, 36 C. C. A. 494, 496-497 (1899); United States v. Eisenbeis, 112 Fed. 190, 194-195, 50 C. C. A. 179, 183-184 (1901).—Ed.

the Orpheus was attached under process from the State Court on the 5th of March, and she was arrested by the marshal under process from this court on the 15th. If the vessel, at the time when the marshal served his precept, was in custody of the sheriff, it is well settled that the arrest of the marshal was illegal and void. The case of The Robert Fulton (Case No. 11,890), and that of The Oliver Jordon (Id. 10,503), decided at the last term of the Circuit Court in Maine are directly in point. It is said by the Supreme Court, that under our system of government there is no mode of preventing an embarrassing and dangerous conflict of jurisdiction between the courts of the States and those of the United States, but to consider personal property, which is in the custody of one to be withdrawn from the process of the other, except in those special cases provided for by statute. Act March 2, 1833, 4 Stat. p. 634; Harris v. Dennie, 3 Pet. (28 U. S.) 299; Hagan v. Lewis, 10 Pet. (35 U. S.) 401; Pulliam v. Osborne, 17 How. (58 U. S.) 471. To meet this difficulty, it is said that in the proceedings under the state process there were fatal irregularities and defects, which render the whole proceedings void. But the ready answer is that the case is still pending before the State Court, and the question whether these irregularities are fatal must be decided there, and not by this court. It may be a good reason why these libels should not be dismissed, but allowed to remain on the docket till that case is decided. If the State Court dismisses the suits, on which the vessel was attached by the sheriff, it may appear that the seizure of the marshal was lawful, and these cases proceed to a hearing. But until it is ascertained whether this court has jurisdiction, it would be altogether irregular to proceed to a final decree. When the sheriff made the attachment he appointed Mr. Jameson keeper, and put him in possession of the ship. The keeper was examined, and he says that he remained keeper for seventeen days, two or three days after the arrest by the marshal. At the time when he went aboard, the ship was unfinished and the carpenters were employed in completing the joiner work. During the whole time the weather was extremely cold, and no fire was allowed in the ship; and on account of the severity of the weather the keeper did not remain aboard during the nights. But as she lay at the wharf the vessel was so high that there was no entrance aboard but by a ladder, which was placed there in the morning and taken away at night, and the keeper was there first in the morning before the ladder was put up, and last in the evening when it was removed. Through the whole period of his

custody, in the day time, he was either in the vessel or near her, on the wharf or in a counting room where the vessel was in plain sight, and was at no time during the day out of sight of the ship; so that it was impossible for her to be removed without his knowledge. During the whole time joiners were at work on the vessel, and many persons were coming and going to visit and look at her, and others were employed in taking in cargo. Mr. Jameson says that he does not know whether he was in the vessel or not when the marshal made the arrest, he not knowing personally the officer, and that he did not know of the arrest until two or three days after it was made, when he notified the marshal's keeper of his possession. Such are the facts with respect to the sheriff's custody, and the question is whether it was sufficient to satisfy the law. My opinion is that it was. The nature and kind of possession of personal property that is required of an officer to preserve an attachment depends on the nature of the property. Light articles of small value may properly be removed and kept in immediate possession. But this is impracticable with large articles upon a ship. All that is necessary, in respect to such articles, is that the custody be such as will enable the keeper to assert his possessory rights and prevent its being withdrawn without his knowledge. So it has been adjudged by the Supreme Court of the State. Where heavy blocks of granite were attached and put in possession of a keeper, whose house was within sight of them, and who passed them daily in going to and from his work, this was held to be a sufficient possession without removing them. Sanderson v. Edwards, 16 Pick. 144; Hemmenway v. Wheeler, 14 Pick. 408.[1]

ABLEMAN v. BOOTH and UNITED STATES v. BOOTH.

Supreme Court of the United States. 1858.

62 U. S. (21 Howard) 506, 16 L. Ed. 169.

MR. CHIEF JUSTICE TANNEY delivered the opinion of the court.

We do not question the authority of the State Court, or judge, who is authorized by the laws of the State to issue the writ of

[1] Only a portion of the opinion is reprinted.
For another case on what amounts to possession, see Holland Trust Co. v. International Bridge & Tramway Co., 85 Fed. 865, 29 C. C. A. 460.—Ed.

habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what causes and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State Judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under the State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunal alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a habeas corpus issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty

to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.[1]

Ex Parte CROUCH.

Supreme Court of the United States. 1884.

112 U. S. 178, 5 S. Ct. 96, 28 L. Ed. 690.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This petition is denied. The general revenue law of Virginia provides that no person shall do business in the State as a "sample merchant" until he has obtained a license therefor, on payment of a tax of seventy-five dollars; and that, if he does, he shall pay a fine of five hundred dollars for the first offense, and six hundred dollars for each succeeding offense. Acts of Virginia, 1884, ch. 445, §§ 30, 31, pp. 578, 579. The petitioner has been informed against, and is now held in custody for trial by order of the Hustings Court of the City of Richmond, for a violation of this law. According to the statements in the petition presented to us, the defense of the petitioner, upon the trial of that case, will be a tender by him, before commencing business, to the proper revenue officer of the State, of the amount of the required license tax, in coupons cut from State bonds, which the State when it issued the bonds agreed should be receivable in payment of all State dues; and a refusal of the officer to accept the tender and give a proper certificate therefor, because by a statute, enacted after the issue of the bonds, the tax-receiving officers were prohibited from taking the coupons for this tax. The right of the petitioner to a writ of habeas corpus from this court is put in the petition on the ground that the petitioner is detained in custody by the State Court, in violation of the Constitution of the United States, because the statute which prohibits the officer from accepting the coupons impairs the obligation of the contract of the State to receive them, and is on that account, inoperative and void, by reason

[1] Only a portion of the opinion is reprinted.—Ed.

of the provision of the Constitution which precludes the State from passing such laws.

It is not claimed that the law which imposes the tax and fixes the penalty for doing business without its payment is unconstitutional. Neither is it pretended that the Hustings Court has not plenary jurisdiction for the trial of persons charged with a violation of the law. The petitioner is, therefore, in the custody of a State Court of competent jurisdiction, and held for trial upon an information for violating a criminal statute of the State. He seeks to be discharged by habeas corpus, not because, if guilty of the charge which has been made against him, the court is without jurisdiction to hold him for trial, and to convict and sentence him, but because, as he alleges, he has a valid defense to the charge, which grows out of a provision in the Constitution of the United States, and, for this reason, he insists he is detained in violation of the Constitution. It is elementary learning that, if a prisoner is in the custody of a State Court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of habeas corpus is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous. Ex parte Watkins, 3 Pet. 202; Ex parte Lange, 18 Wall. 163, 166; Ex parte Parks, 92 U. S. 18, 23; Ex parte Siebold, 100 U. S. 371, 374; Ex parte Virginia, Id. 339, 343; Ex parte Rowland, 104 U. S. 604, 612; Ex parte Curtis, 106 U. S. 371, 375; Ex parte Yarbrough, 110 U. S. 651, 653. Of course, what is here said has no application to writs of habeas corpus cum causa issued by the courts of the United States, in aid of their jurisdiction, upon the removal of suits or prosecutions from State courts for trial under the authority of an act of Congress.

Denied.

APPENDIX

APPENDIX

THE JUDICIAL CODE

An Act To codify, revise, and amend the laws relating to the judiciary.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, head-notes, and sections, entitled, numbered, and to read as follows:

TITLE

The Judiciary

CHAPTER I

DISTRICT COURTS—ORGANIZATION

§ 1. District courts established—Appointment and residence of judges.
§ 2. Salaries of district judges.
§ 3. Clerks.
§ 4. Deputy clerks.
§ 5. Criers and bailiffs.
§ 6. Records—Where kept.
§ 7. Effect of altering terms.
§ 8. Trials not discontinued by new term.
§ 9. Court always open as courts of admiralty and equity.
§ 10. Monthly adjournments for trial of criminal causes.
§ 11. Special terms.
§ 12. Adjournment in case of nonattendance of judge.
§ 13. Designation of another judge in case of disability of judge.
§ 14. Designation of another judge in case of an accumulation of business.
§ 15. When designation to be made by Chief Justice.
§ 16. New appointment and revocation.
§ 17. Designation of district judge in aid of another judge.
§ 18. When circuit judge may be designated to hold district court.
§ 19. Duty of district and circuit judge in such cases.
§ 20. When district judge is interested or related to parties.

§ 21. When affidavit of personal bias or prejudice of judge is filed.
§ 22. Continuance in case of vacancy in office.
§ 23. Districts having more than one judge—Division of business.

§ 1. In each of the districts described in Chapter V there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: *Provided,* That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: *Provided further,* That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

Amended by the Act of July 30th, 1914, c. 216 (38 Stat. L. 580).

By the Act of February 16, 1914, c. 20 (38 Stat. 283) provisions were made in relation to the Eastern District of Pennsylvania and the Southern District of Georgia.

By the Act of March 3, 1915, c. 100 (38 Stat. L. 961) provisions were made in relation to the Eastern and Western Districts of South Carolina.

By the Act of April 11, 1916, c. 64 (39 Stat. L. 48) an additional judge was provided for the district of New Jersey.

By the Act of February 26, 1917, c. 120 (39 Stat. L. 938) provision for an additional judge for the Western District of Texas was made.

§ 2. Each of the district judges, including the judges in Porto Rico, Hawaii, and Alaska exercising Federal jurisdiction, shall receive a salary of $7,500 a year, to be paid in monthly installments.

Amended by the Act of February 25, 1919, c. 29 (40 Stat. L. 1156).

§ 3. A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

§ 4. Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

§ 5. The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes.

§ 6. The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

§ 7. No action, suit, proceeding or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof.

§ 8. When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

§ 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mense and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

§ 10. District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

§ 11. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term.

§ 12. If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

§ 13. When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability.

Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed.

§ 14. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein.

§ 15. If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the chief justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.

§ 16. Any such circuit judge, or circuit justice, or the chief justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and

appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.

§ 17. It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit.

§ 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the chief justice, the public interest shall require, the said judge, or associate justice, or chief justice, shall designate and appoint any circuit judge of the circuit to hold said district court. Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court of said circuit it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation or urgency of business, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district court in another circuit to hold a district court within the said second circuit, and to have and exercise within the district to which he is so assigned the same powers that are vested in the judge thereof: *Provided,* That such judge so designated and appointed shall have consented, in writing, to such designation and appointment: *And provided further,* That the senior circuit judge of the circuit within which such judge so designated and appointed resides shall certify, in writing, that the business of the district of such judge will not suffer thereby. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. Each of the said district judges may in the case of such appointment, hold separately, at the same time, a district court in such district, and discharge all of the judicial duties of the district judge therein.

Amended by Act of October 3, 1913, c. 18 (38 Stat. L. 137).

§ 19. It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

§ 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section 14.

§ 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section 23, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

§ 22. When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such

court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section 19.

§ 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

CHAPTER II

DISTRICT COURTS—JURISDICTION

§ 24. Original jurisdiction.

Par. 1. Where the United States are plaintiffs—And of civil suits at common law or in equity.
2. Of crimes and offenses.
3. Of admiralty causes, seizures, and prizes.
4. Of suits under any law relating to the slave trade.
5. Of cases under internal revenue, customs and tonnage laws.
6. Of suits under postal laws.
7. Of suits under the patent, the copyright, and the trademark laws.
8. Of suits for violation of interstate commerce laws.
9. Of penalties and forfeitures.
10. Of suits on debentures.
11. Of suits for injuries on account of acts done under laws of the United States.
12. Of suits concerning civil rights.
13. Of suits against persons having knowledge of conspiracy, etc.
14. Of suits to redress the deprivation, under color of law, of civil rights.
15. Of suits to recover certain offices.
16. Of suits against national-banking associations.
17. Of suits by alien for torts.
18. Of suits against consuls and vice-consuls.
19. Of suits and proceedings in bankruptcy.
20. Of suits against the United States.
21. Of suits for the unlawful inclosure of public lands.
22. Of suits under immigration and contract-labor laws.

23. Of suits against trusts, monopolies, and unlawful combinations.
24. Of suits concerning allotments of land to Indians.
25. Of partition suits where United States is joint tenant.
§ 25. Appellate jurisdiction under Chinese exclusion laws.
§ 26. Appellate jurisdiction over Yellowstone National Park.
§ 27. Jurisdiction of crimes on Indian reservations in South Dakota.

§ 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue or between citizens of the same state claiming lands under grants from different states or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Amended by Act of Oct. 6, 1917, c. 97 (40 Stat. L. 395).

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the court of customs appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the commerce court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1980, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs men-

tioned in section 1980, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States, providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided,* That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the states.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the court of claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the court of claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and

tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to retrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

Amended by the Act of Dec. 21, 1911, c. 5 (37 Stat. L. 46).

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

§ 25. The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

§ 26. The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone

National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

§ 27. The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

CHAPTER III

DISTRICT COURTS—REMOVAL OF CAUSES

§ 28. Removal of suits from State to United States district courts.
§ 29. Procedure for removal.
§ 30. Suits under grants of land from different states.
§ 31. Removal of causes against persons denied any civil rights, etc.
§ 32. When petitioner is in actual custody of state court.
§ 33. Suits and prosecutions against revenue officers, etc.
§ 34. Removal of suits by aliens.
§ 35. When copies of record are refused by clerk of state court.
§ 36. Previous attachment bonds, orders, etc., remain valid.
§ 37. Suits improperly in district court may be dismissed or remanded.
§ 38. Proceedings in suits removed.
§ 39. Time for filing record—Return of record, how enforced.

§ 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the

district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: *Provided,* That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said state court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided,* That no case arising under an Act entitled "An Act relating to the

liability of common carriers by railroad to their employees in certain cases,'' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States. *And provided further,* That no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth. nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.

Amended by Act of January 20, 1914, c. 11 (38 Stat. L. 278).

§ 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the

said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

§ 30. If in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the state court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

§ 31. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed

in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said state court the cause shall proceed therein as if no petition for removal had been filed.

§ 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus *cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

§ 33. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall

issue a writ of habeas corpus *cum causa,* a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus *cum causa,* to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

Amended by the Act of Aug. 23, 1916, c. 399 (39 Stat. L. 532).

§ 34. Whenever a personal action has been or shall be brought in any state court by an alien against any citizen of a state who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that state wherein jurisdiction is obtained by the state court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a state court by the provisions of the preceding section.

§ 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a state court, to be used in any court of the United States, if the clerk of said state court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit

that the clerk of said state court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

§ 36. When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

§ 37. If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs, or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

§ 38. The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal.

§ 39. In all causes removable under this chapter, if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

CHAPTER IV

DISTRICT COURTS—MISCELLANEOUS PROVISIONS

§ 40. Capital cases—Where triable.
§ 41. Offenses on the high seas, etc., where triable.
§ 42. Offenses begun in one district and completed in another.
§ 43. Suits for penalties and forfeitures, where brought.
§ 44. Suits for internal-revenue taxes, where brought.
§ 45. Seizures, where cognizable.

§ 46. Capture of insurrectionary property, where cognizable.
§ 47. Certain seizures cognizable in any district into which the property is taken.
§ 48. Jurisdiction in patent cases.
§ 49. Proceedings to enjoin comptroller of the currency.
§ 50. When a part of several defendants can not be served.
§ 51. Civil suits—Where to be brought.
§ 52. Suits in states containing more than one district.
§ 53. Districts containing more than one division—Where suit to be brought—Transfer of criminal cases.
§ 54. Suits of a local nature, where to be brought.
§ 55. When property lies in different districts in same state.
§ 56. When property lies in different states in same circuit—Jurisdiction of receiver.
§ 57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.
§ 58. Civil causes may be transferred to another division of district by agreement.
§ 59. Upon creation of new district or division, where prosecution to be instituted or action brought.
§ 60. Creation of new district, or transfer of territory not to divest lien—How lien to be enforced.
§ 61. Commissioners to administer oaths to appraisers.
§ 62. Transfer of records to district court when a territory becomes a state.
§ 63. District judge shall demand and compel delivery of records of territorial court.
§ 64. Jurisdiction of district courts in cases transferred from territorial courts.
§ 65. Receivers to manage property according to state laws.
§ 66. Suits against receiver.
§ 67. Certain persons not to be appointed or employed as officers of courts.
§ 68. Certain persons not to be masters or receivers.

§ 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

§ 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.

§ 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

§ 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

§ 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

§ 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

§ 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

§ 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a state or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such state or section, or of any vessel belonging, in whole or in part, to any inhabitant of such state or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

§ 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law

or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

§ 49. All proceedings by any national banking association to enjoin the comptroller of the currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

§ 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

§ 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

§ 52. When a state contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such state, must be brought in the district

where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state.

§ 53. When a district contains more than one division every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the district court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States District Court in such division.

§ 54. In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit

is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

§ 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

§ 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different states in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the state in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

§ 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is

brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

§ 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district,

without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

§ 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

§ 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another

district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or territory is transferred by this or any future act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

§ 61. Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

§ 62. When any territory is admitted as a state, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the supreme court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said state.

§ 63. It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein men-

tioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law.

§ 64. When any territory is admitted as a state, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the trial courts of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the supreme court or to the circuit court of appeals, and shall proceed to hear and determine the same.

§ 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violated any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

§ 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

§ 67. No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court.

§ 68. No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

CHAPTER V

DISTRICT COURTS—DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES

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§ 115. Wyoming.

§ 69. The United States are divided into judicial districts as follows:

§ 70. The state of Alabama is divided into three judicial districts, to be known as the northern, middle and southern districts of Alabama. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison and Morgan, which shall constitute the northeastern division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherokee, De Kalb, Etowah, Marshall and Saint Clair, which shall constitute the middle division of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson and Shelby, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette and Lamar, which shall constitute the Jasper division of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne and Talladega, which shall constitute the eastern division of said district; also the territory embraced

on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter and Tuscaloosa, which shall constitute the western division of said district. Terms of the district court for the northeastern division shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February and the third Tuesday in October: *Provided,* that suitable rooms and accommodations for holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gadsden on the first Tuesdays in February and August: *Provided,* That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the Government; for the southern division, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the Jasper division, at Jasper on the second Tuesdays in January and June: *Provided,* That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesday in January and June. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery and Pike, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry and Houston, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Chambers, Lee, Macon, Randolph, Russell and Tallapoosa, which shall constitute the eastern division of said middle district. Terms of the district court for the northern division shall be held at Montgomery on the first Tuesdays in May and December; and for the southern division, at Dothan on the first Mondays in June and December; and for the eastern division, at Opelika on the first Mondays in April and November: *Provided,* That suitable rooms and accommodations for holding court at

Opelika shall be furnished free of expense to the Government. The clerk of the court for the middle district shall maintain an office, in charge of himself or a deputy at Dothan, and shall maintain an office in charge of himself or a deputy at Opelika, which said offices at Dothan and Opelika shall be kept open at all times for the transaction of the business of said divisions. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clark, Conecuh, Escambia, Mobile, Monroe and Washington, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry and Wilcox, which shall constitute the northern division of said district. Terms of the district court for the southern division shall be held at Mobile on the fourth Mondays in May and November; and for the northern division, at Selma on the first Mondays in May and November.

As amended by Act of Feb. 28, 1913, c. 89 (38 Stat. L. 698).

§ 00. [The state of Arizona shall constitute one judicial district, to be known as the district of Arizona. Terms of the district court shall be held in Tucson on the first Mondays in May and November; at Phoenix on the first Mondays in April and October; at Prescott on the first Mondays in March and September; and at Globe on the first Mondays in June and December. Causes, civil and criminal, may be transferred by the court or judge thereof from any of the aforesaid places where court shall be held in said district to any of the places hereinbefore mentioned in said district when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in any of the hereinbefore mentioned places.]

Act of Oct. 3, 1913, c. 17 (38 Stat. L. 203).

§ 71. The state of Arkansas is divided into two districts, to be known as the eastern and western districts of Arkansas. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union and Calhoun, which shall constitute the Texarkana division of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton and Johnson, which shall constitute the Fort Smith division of said district;

also the territory embraced on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton and Searcy, which shall constitute the Harrison division of said district. Terms of the district court for the Texarkana division shall be held at Texarkana on the second Mondays in May and November; for the Fort Smith division, at Fort Smith on the second Mondays in January and June; and for the Harrison division, at Harrison on the second Mondays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe and Woodruff, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp and Jackson, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph and Lawrence, which shall constitute the Jonesboro division of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren and White, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Helena on the second Monday in March and the first Monday in October; for the northern division, at Batesville on the fourth Monday in May and the second Monday in December; for the Jonesboro division, at Jonesboro on the second Mondays in May and November; and for the western division, at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the eastern district shall mantain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the western district shall mantain an office in charge of himself or a deputy at Fort Smith, at Harrison, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court.

By Act of Sept. 9, 1914, c. 295 (38 Stat. L. 713), the terms of the district court for the Jonesboro division of the eastern district of Arkansas were fixed for the first Monday in May and the fourth Monday in November. By Act of March 4, 1915, c. 170 (38 Stat. L. 1193), Desha and Chicot counties were

transferred to the eastern division of the eastern district, and Yell county was made a part of the western division of the eastern district.

§ 72. The state of California is divided into two districts, to be known as the northern and southern districts of California. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced and Tulare, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Fresno on the first Monday in May and the second Monday in November; and for the southern division, at Los Angeles, on the second Monday in January and the second Monday in July, and at San Diego on the second Monday in March and September. The northern district shall include the territory embraced, on the first day of July, nineteen hundred and ten, in the counties of Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solana, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Tuolumne, Alpine, and Mono, which shall consittute the northern division of said district; also the territory embraced, on the date last mentioned, in the counties of San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Santa Cruz, Monterey, and San Benito, which shall constitute the southern division of said district. Terms of the district court for the northern division of the northern district shall be held at Sacramento on the second Monday in April and the first Monday in October, and at Eureka on the third Monday in July; and for the southern division of the northern district, at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November. The clerk of the district court for the northern district shall maintain an office at Sacramento, in charge of himself or deputy, which shall be kept open at all times for the transaction of the business of the court.

Amended by the Act of May 16, 1916, c. 122 (39 Stat. L. 122).

§ 73. The state of Colorado shall constitute one judicial district, to be known as the district of Colorado. Terms of the district court shall be held at Denver on the first Tuesday in May and No-

vember; at Pueblo on the first Tuesday in April; at Grand Junction on the second Tuesday in September; at Montrose on the third Tuesday in September, and at Durango on the fourth Tuesday in September. That the Secretary of the Treasury, in constructing the public buildings heretofore authorized to be constructed at the cities of Grand Junction and Durango, be, and he is hereby, authorized and empowered to provide accommodations in each of said buildings for post office, United States court, and other governmental offices, and the existing authorizations for said buildings be and the same are hereby respectively amended accordingly; and the unexpended balance of all appropriations heretofore made for the construction of said buildings and all appropriations which may be provided in any pending legislation, or that hereafter may be made for the construction of said buildings, are hereby made available for the purpose stated in this paragraph: *Provided*, That if at the time the holding of the terms of said court in any years in either of said cities of Grand Junction and Durango there is no business to be transacted by said court, the term may be adjourned or continued by order of the judge of said court in chambers at Denver, Colorado: *And provided further*, That the marshal and clerk of said court shall each respectively appoint at least one deputy to reside at and who shall maintain an office at each of the four said places where said court is to be held by the terms of this Act.

Amended by the Act of June 12, 1916, c. 143 (39 Stat. L. 225).

§ 74. The state of Connecticut shall constitute one judicial district, to be known as the district of Connecticut. Terms of the district court shall be held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December.

§ 75. The state of Delaware shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September and December.

§ 76. The state of Florida is divided into two districts, to be known as the northern and southern districts of Florida. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee,

Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton and Washington. Terms of the district court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December.

§ 77. The state of Georgia is divided into two districts, to be known as the northern and southern districts of Georgia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, Dekalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton and White, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup and Webster, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker and Whitfield, which shall constitute the northwestern division of said district. Terms

of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October, and at Gainesville on the fourth Mondays in April and November, and it shall be the duty of the judge to assign such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases, and as may be in the interest of economical expenditures by the Government; for the eastern division, at Athens on the second Monday in April and the first Monday in November; for the western division, at Columbus on the first Mondays in May and December; and for the northwestern division, at Rome on the third Mondays in May and November. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Athens, at Columbus and at Rome, which shall be kept open at all times for the transaction of the business of the court. The southern district shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs and Wayne, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox and Wilkinson, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes and Warren, which shall constitute the northeastern division; also the territory embraced on the date last mentioned in the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce and Ware, which shall constitute the southwestern division; and also the territory embraced on the date last mentioned in the counties of Baker, Ben Hill, Calhoun, Crisp, Colquitt, Dougherty, Lee, Miller, Mitchell, Thomas, Tift, Turner and Worth, which shall constitute the Albany division. Terms of the district court for the western division shall be held at Macon on the first Mondays in May and October; for the eastern division, at Savannah on the second Tuesdays in February, May, August and November; for the northeastern division, at Augusta on the first Monday in April and the third Monday in November; for the southwestern division, at Valdosta

on the second Mondays in June and December; and for the Albany division, at Albany on the third Mondays in June and December.

Amended by Act of March 4, 1913, c. 167 (37 Stat. L. 1017). By Act of March 3, 1915 (38 Stat. L. 960), the counties of Candler, Jenkins and Evans were attached to the eastern division of the southeast district, and the counties of Bacon and Thomas to the southwestern division of the southern district, and the county of Barrow was attached to the eastern division of the northern district.

§ 78. The state of Idaho shall constitute one judicial district, to be known as the district of Idaho. It is divided into four divisions, to be known as the northern, central, southern and eastern divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bonner, Kootenai and Shoshone, shall constitute the northern division of said district; and the territory embraced on the date last mentioned in the counties of Idaho, Latah and Nez Perce, shall constitute the central division of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee and Washington, shall constitute the southern division of said district; and the territory embraced on the date last mentioned in the counties of Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi and Oneida, shall constitute the eastern division of said district. Terms of the district court for the northern division of said district shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October. The clerk of the court shall maintain an office in charge of himself or a deputy at Coeur d'Alene City, at Moscow, at Boise City and at Pocatello, which shall be open at all times for the transaction of the business of the court.

§ 79. The state of Illinois is divided into three districts, to be known as the northern, southern and eastern districts of Illinois. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cook, Dekalb, Dupage, Grundy, Kane, Kendall, Lake, LaSalle, McHenry and Will, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the

counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside and Winnebago, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October and November, and the third Monday in December; and for the western division, at Freeport on the third Mondays in April and October. The clerk of the court for the northern district shall mantain an office in charge of himself or a deputy at Chicago and at Freeport, which shall be kept open at all times for the transaction of the business of the court. The marshal for the northern district shall maintain an office in the division in which he himself does not reside and shall appoint at least one deputy who shall reside therein. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren and Woodford, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Green, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler and Scott, which shall constitute the southern division. Terms of the district court for the northern division shall be held at Peoria on the third Mondays in April and October; for the southern division, at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at Peoria, at Springfield and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern division, who shall maintain an office at Peoria. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White and Williamson. The terms of the district court for the eastern district

shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East Saint Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo and at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files and documents pertaining to the court at that place.

§ 80. The state of Indiana shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesday in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep his office at New Albany, one at Evansville, one at Fort Wayne and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place.

§ 81. The state of Iowa is divided into two judicial districts, to be known as the northern and southern districts of Iowa. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell and Jackson, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Iowa, Benton, Tama, Grundy and Hardin, which shall constitute the Cedar Rapids division; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Carroll, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin and Butler, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury and Monona, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December,

and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division, at Fort Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee and Van Buren, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren and Madison, which shall constitute the central division of said district; also the territory embraced on the date last mentioned in the counties of Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills and Montgomery, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union and Wayne, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, Johnson and Clinton, which shall constitute the Davenport division of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe and Wapello, which shall constitute the Ottumwa division of said district. Terms of the district court for the eastern division shall be held at Keokuk on the sixth Tuesday after the fourth Tuesday in February and the eighth Tuesday after the third Tuesday in September; for the central division, at Des Moines on the tenth Tuesday after the fourth Tuesday in February and the tenth Tuesday after the third Tuesday in September; for the western division, at Council Bluffs on the fourth Tuesday in February and the sixth Tuesday after the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday after the fourth Tuesday in February and the third Tuesday in September; for the Davenport division, at Davenport on the eighth Tuesday atfer the fourth Tuesday in February and the second Tuesday after the third Tuesday in September; and for the Ottumwa division, at Ottumwa on the second Tuesday after the fourth Tuesday in February and the fourth Tuesday after the third Tuesday in September.

Amended by the Acts of March 3, 1913, c. 122 (37 Stat. L. 734), February 23, 1916, c. 32 (39 Stat. L. 12), April 27, 1916, c. 90 (39 Stat. L. 55).

§ 82. The state of Kansas shall constitute one judicial district, to be known as the district of Kansas. It is divided into three divisions, to be known as the first, second and third divisions of the district of Kansas. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington and Wyandotte. The second division shall include the territory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton and Wichita. The third division shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson and Woodson. Terms of the district court for the first division shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May. Terms of the district court for the second division shall be held at Wichita on the second Mondays in March and September; and for the third division, at Fort Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint three deputies, one of whom shall reside and keep his office at Fort Scott, one at Wichita, and the other at Salina, and the marshal shall appoint a deputy who shall reside and keep his office at Fort Scott, and the marshal shall also appoint a deputy, who shall reside and keep his office at Kansas City.

Amended by the Act of Sept. 6, 1916, c. 447 (39 Stat. L. 725).

§ 83. The state of Kentucky is divided into two districts, to be known as the eastern and western districts of Kentucky. The eastern district shall include the territory embraced on the first

day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided,* That suitable rooms and accommodations are furnished for holding court at Jackson free of expense to the Government until such time as a public building shall be erected there. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey, Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalf, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Brayson, Hardin, Meade, Breckinridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd, Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Frankfort, at Covington, at Richmond, at London, at Catlettsburg and at Jackson; and the clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all

times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought.

§ 84. The state of Louisiana is divided into two judicial districts, to be known as the eastern and western districts of Louisiana. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne and Washington, which shall constitute the New Orleans division; also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville and West Feliciana, which shall constitute the Baton Rouge division of said district. Terms of the district court for the New Orleans division shall be held at New Orleans on the third Mondays in February, May and November; and for the Baton Rouge division, at Baton Rouge on the second Mondays in April and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette and Vermilion, which shall constitute the Opelousas division of said district; also the territory embraced on the date last mentioned in the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant and Winn, which shall constitute the Alexandria division of said district; also the territory embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine and Red River,

which shall constitute the Shreveport division of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson and Lincoln, which shall constitute the Monroe division of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron and Vernon, which shall constitute the Lake Charles division of said district. Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe and at Lake Charles, which shall be kept open at all times for the transaction of the business of the court.

§ 85. The state of Maine shall constitute one judicial district, to be known as the district of Maine. Terms of the district court shall be held at the times and places following. At Portland, on the first Tuesday in April, on the third Tuesday in September, and on the second Tuesday in December at Bangor, on the first Tuesday in June: *Provided, however,* That in nineteen hundred and twelve a session shall be held at Portland on the first Tuesday in February.

Amended by the Act of Dec. 22, 1911, c. 7 (37 Stat. L. 51).

By the Act of September 8, 1916, c. 475 (39 Stat. L. 850), it was provided that:

There should be two sessions of the District Court for the District of Maine at Bangor, one beginning on the first Tuesday of February and the other on the first Tuesday in June,

There should be three sessions of said court at Portland, one on the first Tuesday in April, one on the third Tuesday in September and one on the second Tuesday in December.

That the marshal should keep offices at Bangor and Portland,

That there should be two divisions of the judicial district of Maine, a southern and a northern division.

§ 86. The state of Maryland shall constitute one judicial district, to be known as the district of Maryland. Terms of the

district court shall be held at Baltimore on the first Tuesdays in March, June, September and December; and at Cumberland on the second Monday in May and the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy, who shall reside and maintain an office at Cumberland, unless he shall himself reside there.

§ 87. The state of Massachusetts shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided,* That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the Government until such time as a federal building shall be erected there for that purpose. The marshal and the clerk for said district shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place.

§ 88. The state of Michigan is divided into two judicial districts, to be known as the eastern and western districts of Michigan. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee and Tuscolo, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw and Wayne, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Detroit on the first Tuesdays in March, June and November; for the northern division, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of

February in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon and Schoolcraft, which shall constitute the northern division; also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Macosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren and Wexford, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Grand Rapids on the first Tuesdays in March and October; and for the northern division, at Marquette on the first Tuesdays in May and September. All issues of fact shall be tried at the terms held in the division where such suit shall be commenced. Actions in rem and admiralty may be brought in whichever division of the eastern district service can be had upon the *res*. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the western district shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court held at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the eastern district shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said district shall keep an office and a deputy marshal at Bay City, and mileage on service of process in said northern division shall be computed from Bay City.

By Act of July 9, 1912, c. 222 (37 Stat. L. 190), the terms of the court for the western district for the southern division were fixed for Grand Rapids on the first Tuesdays of March, June, October and December, and for the northern division at Marquette on the second Tuesdays of April and September, and at Sault Sainte Marie on the second Tuesdays of January and July.

§ 89. The state of Minnesota shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the first, second, third, fourth, fifth and sixth divisions. The first division shall include the

territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore and Houston. The second division shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley and Lac qui Parle. The third division shall include the territory embraced on the date last mentioned in the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The fourth division shall include the territory embraced on the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The fifth division shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aikin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The sixth division shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Wadena, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the first division shall be held at Winona on the third Tuesdays in May and November; for the second division, at Mankato on the fourth Tuesdays in April and October; for the third division, at Saint Paul on the first Tuesdays in June and December; for the fourth division, at Minneapolis on the first Tuesdays in April and October; for the fifth division, at Duluth on the second Tuesdays in January and July; and for the sixth division, at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court.

§ 90. The state of Mississippi is divided into two judicial districts, to be known as the northern and southern district of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Ponotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said

district; also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the Delta division of said district. The terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December; and for the Delta division, at Clarksdale on the fourth Mondays in January and July: *Provided,* That suitable rooms and accommodations for holding court at Clarksdale are furnished free of expense to the United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Moxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which constitutes the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held, at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district.

Amended by the Act of February 5, 1912, c. 28 (37 Stat. L. 59), and the Act of May 27, 1912, c. 136 (37 Stat. L. 118).

§ 91. The state of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the southeastern division of said district. Terms of the district court for the eastern division shall be held at Saint Louis on the third Mondays in March and September, and at Rolla on the second Mondays in January and June: *Provided,* That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the northern division, at Hannibal on the fourth Monday in May and the first Monday in December; and for the southeastern division at Cape Girardeau on the second Mondays in April and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline and Sullivan, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the southwestern division; also the territory embraced on the date last mentioned in the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the Saint Joseph division; also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede,

Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which constitutes the southern division. Terms of the district court for the western division shall be held at Kansas City on the fourth Monday in April and first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided,* That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the southwestern division, at Joplin on the second Mondays in June and January; for the Saint Joseph division, at Saint Joseph on the first Monday in March and third Monday in September; for the central division, at Jefferson City on the third Mondays in March and October; and for the southern division at Springfield on the first Mondays in April and October.

The clerk of the court at St. Louis, in the eastern district, shall maintain an office in charge of himself or a deputy at St. Louis and Hannibal and at such other places of holding court in said district as may be deemed necessary by the judge which shall be kept open at all times for the transaction of the business of the court.

The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Joseph, at Chillicothe, at Joplin and at Springfield, which shall be kept open at all times for the transaction of the business of the court.

The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district.

Amended by the Act of December 22, 1911, c. 8 (37 Stat. L. 51).

§ 92. The state of Montana shall constitute one judicial district, to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place.

§ 93. The state of Nebraska shall constitute one judicial district to be known as the district of Nebraska. Said district is divided into eight divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the Omaha division; the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the Norfolk division; the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Boxbutte, and Sioux, shall constitute the Chadron division; the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the Grand Island division; the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's Bluff, shall constitute the North Platte division; the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the Lincoln division; the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the Hastings division; and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the McCook division. Terms of the district court for the Omaha division shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the Norfolk division, at Norfolk on the third Monday in September; for the Chadron division, at Chadron on the second Monday in September; for the Grand Island division, at Grand Island on the second Monday in January; for the North Platte division, at North Platte on the second Monday in June; for the Lincoln division, at Lincoln on the second Monday in May and the first Monday in October; for the Hastings division, at Hastings on the second Monday in March; and for the McCook division, at McCook on the first Monday in March: *Provided*, That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with

light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed.

§ 94. The state of Nevada shall constitute one judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October.

§ 95. The state of New Hampshire shall constitute one judicial district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the last Tuesday in October, at Concord on the last Tuesday in April and the second Tuesday in December, and at Littleton on the third Tuesday in September.

Amended by the Act of August 23, 1912, c. 344 (37 Stat. L. 357).

§ 96. The state of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Newark on the first Tuesday in April and the first Tuesday in November, and at Trenton on the third Tuesday in January and the second Tuesday in September of each year. The clerk of the court for the district of New Jersey shall maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court; and the marshal shall also maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court.

Amended by the Act of August 9, 1912, c. 277 (37 Stat. L. 265), and the Act of February 14, 1913, c. 53 (37 Stat. L. 674).

§ 000. That the state, when admitted as aforesaid, shall constitute one judicial district, and the circuit and district courts of said district shall be held at the capital of said state, and the said district shall, for judicial purposes, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary

the same as other similar judges of the United States, payable as provided for by law, and shall reside in the district to which he is appointed. There shall be appointed clerks of said court, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held on the first Monday in April and the first Monday in October of each year. The circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and the clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in the Territory of New Mexico.

Act of June 20, 1910, c. 310 (36 Stat. L. 565).

§ 97. The state of New York is divided into four judicial districts, to be known as the northern, eastern, southern, and western districts of New York. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The eastern district shall include the territory embraced on the first day of July, nineteen hundred

and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions and for proceedings in bankruptcy and the trial of causes in admiralty, shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the state of New York may perform the duties of the judge of any other district in such state upon the request of any resident judge entered in the minutes of his court; and in such cases such judges shall have the same powers as are vested in the resident judge.

§ 98. The state of North Carolina is divided into two districts, to be known as the eastern and western districts of North Carolina. The eastern district shall include the territory embraced on the

first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Laurinburg on the last Mondays in March and September; at Wilson on the first Mondays in April and October; at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October: *Provided,* That the city of Washington, the city of Laurinburg, and the city of Wilson shall each provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington, at Laurinburg, and at Wilson, until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall mantain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, at Washington, at Laurinburg, and at Wilson, which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the western district shall be held at Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the

western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court.

Amended by the Act of October 7, 1914, c. 318 (38 Stat. L. 728).

§ 99. The state of North Dakota shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, Sheridan, Adams, Bowman, Dunn, Hettinger, Morton, Stark, and McKenzie, shall constitute the southwestern division of said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs, and Steele, shall constitute the southeastern division; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, shall constitute the northeastern division; and the territory embraced on the date last mentioned in the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry, shall constitute the northwestern division; and the territory embraced on the date last mentioned in the counties of Ward, Williams, Montraille, Burk, and Renville, shall constitute the western division. The several Indian reservations and parts thereof within said state shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the southwestern division shall be held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo on the third Tuesday in May; for the northeastern division, at Grand Forks on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; and for the western division, at Minot on the second Tuesday in October. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district.

Amended by the Act of February 5, 1912, c. 28 (37 Stat. L. 60), and the Act of July 17, 1916, c. 248 (39 Stat. L. 386).

§ 100. The state of Ohio is divided into two judicial districts, to be known as the northern and southern districts of Ohio. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga,

Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandotte, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the western division, at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Cleveland, or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the eastern division of said district. Terms of the district court for the western division shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the eastern division, at Columbus on the first Tuesdays in June and December, and at Steubenville on the first Tuesdays of March and September. Grand and petit juries summoned for service at a term of court held at Columbus may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term being held or authorized to be held at Steubenville. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Columbus, or at Steubenville, as the

court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Steubenville. *Provided,* That suitable rooms and accommodations for holding court at Steubenville shall be furnished free of expense to the Government until the completion of the Federal building: *And provided further,* That terms of the district court for the southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the southern district, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton.

Amended by the Act of March 4, 1915, c. 159 (38 Stat. L. 1187).

§ 101. The state of Oklahoma is divided into two judicial districts, to be known as the eastern and the western districts of Oklahoma. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and sixteen, in the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Ofuskee, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the eastern district shall be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; and at Chickasha on the first Monday in November in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and sixteen, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottowatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the western district shall be held at Oklahoma City on the first Monday in January, at Enid on the first Monday in March, at Guthrie on the first Monday in May, at Lawton on the first Monday in September, and at Woodward on the second Monday in November: *Provided,* That suitable rooms and accommodations for hold-

ing court at Woodward are furnished free of expense to the United States. The clerk of the district court for the eastern district shall keep his office at Muskogee and the clerk for the western district at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City.

Amended by the Act of February 20, 1917, c. 102 (39 Stat. L. 927), and the Act of June 13, 1918, c. 97 (40 Stat. L. 604-605).

By the Act of February 26, 1919, c. 54 (40 Stat. L. 1184), it was provided that there should be a term of court for the Eastern Judicial District of Oklahoma at Hugo on the second Monday in May.

§ 102. The state of Oregon shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the clerk for said district shall each appoint, in the manner provided by law, at least one deputy at Pendleton and one at Medford, who shall reside and maintain an office at each of said places.

§ 103. The state of Pennsylvania is divided into three judicial districts, to be known as the eastern, middle, and western districts of Pennsylvania. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the second Monday in March and the third Monday in October; at Harrisburg on the first Mondays in May and December; at Sunbury on the second Monday in January; and at Williamsport on the first Monday in June. The clerk of the court for the middle district shall maintain an office in charge of himself or a deputy at Harrisburg; and civil suits instituted at that place shall be tried

there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburgh on the first Monday of May and the second Monday of November, and terms of the court shall be held at Erie on the third Monday of March, and the third Monday of September. The clerk and marshal of said district shall have their principal office at Pittsburgh, and shall maintain, by themselves or by their deputies, offices at Erie. The clerk shall place all cases in which the defendants reside in the counties of said district nearest Erie upon the trial list for trial at Erie, where the same shall be tried, unless the parties thereto stipulate that the same may be tried at Pittsburgh.

Amended by the Acts of March 3, 1913, c. 113 (37 Stat. L. 730), June 6, 1914, c. 104 (38 Stat. L. 385), and September 9, 1914, c. 296 (38 Stat. L. 713).

§ 104. The state of Rhode Island shall constitute one judicial district, to be known as the district of Rhode Island. Terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November.

Amended by the Act of February 1, 1912, c. 27 (37 Stat. L. 59).

§ 105. The state of South Carolina is divided into two districts, to be known as the eastern and western districts of South Carolina. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the district court for the western district shall be held at Greenville on the third Tuesdays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the

district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other.

Amended by the Act of Feb. 5, 1912, c. 28 (37 Stat. L. 60).

By Act of March 3, 1915, c. 105 (38 Stat. L. 961), amended by the Act of Sept. 1, 1916, c. 423 (39 Stat. L. 721), it is provided that "These terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January, first Tuesday in November; at Florence, first Tuesday in March; and at Aiken on the first Tuesdays in April and October. Terms of the district court for the western district shall be held at Greenville on the first Tuesday in April and the first Tuesday in October; at Rock Hill, the second Tuesdays in March and September; and at Greenwood, the first Tuesdays in February and November. The office of the clerk of the district court for the western district shall be at Greenville and the office of the clerk of the district court for the eastern district shall be at Charleston."

The same act provides for a district judge, a district attorney and a marshal for each district.

§ 106. The state of South Dakota shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the southern division of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the northern division; the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the central division; and the territory embraced on the date last mentioned in the counties of Bennett,

Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the western division. Terms of the district court for the southern division shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the northern division, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the central division, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the western division, at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the district court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court.

§ 107. The state of Tennessee is divided into three districts, to be known as the eastern, middle, and western districts of Tennessee. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Green, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the northeastern division of said district. Terms of the district court for the southern division of said district shall be held at Chattanooga on the fourth Monday in April and the second Monday in November; for the northern division, at Knoxville on the fourth Monday in May and the first Monday in December; and for the northeastern division, at Greeneville on the first Monday in March and the third Monday in September. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson,

which shall constitute the Nashville division of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the northeastern division of said district. Terms of the district court for the Nashville division of said district shall be held at Nashville on the second Monday in March and the fourth Monday in September; and for the northeastern division, at Cookeville on the third Monday in April and the first Monday in November: *Provided,* That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the state of Alabama north to the point in Henry county, Tennessee, where the south boundary line of the state of Kentucky strikes the west bank of the river, which shall constitute the eastern division of said district. Terms of the district court for the western division of said district shall be held at Memphis on the fourth Mondays in May and November; and for the eastern division, at Jackson on the fourth Mondays in April and October. The clerk of the court for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the eastern district shall appoint a deputy who shall reside in Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greeneville, which shall be kept open at all times for the transaction of the business of the court.

Amended by the Act of August 20, 1912, c. 306 (37 Stat. L. 314).

By the Act of June 22, 1916, c. 161 (39 Stat. L. 232), provision was made for holding court at Winchester on the first Monday in April and third Monday in November.

§ 108. The state of Texas is divided into four districts, to be known as the northern, eastern, western, and southern districts of Texas. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwell, which shall constitute the Dallas division; also the territory embraced on the date last mentioned in the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which shall constitute the Fort Worth division; also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which shall constitute the Amarillo division; also the territory embraced on the date last mentioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton and Yoakum, which shall constitute the Abilene division; also the territory embraced on the date last mentioned in the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Iron, Manard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and Upton, which shall constitute the San Angelo division of the said district. Terms of the district court for the Dallas division shall be held at Dallas on the second Monday in January and the first Monday in May; for the Fort Worth division, at Fort Worth on the first Monday in November and the second Monday in March; for the Amarillo division, at Amarillo on the third Monday in April and the fourth Monday in September; for the Abilene division, at Abilene on the first Monday in October and the second Monday in April; and for the San Angelo division at San Angelo on the third Monday in October and the fourth Monday in April. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, and at San Angelo, which shall be kept open at all times for the transaction of the business of the court. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Anderson, Angelina, Cherokee, Gregg, Henderson,

Houston, Nacogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which shall constitute the Tyler division; also the territory embraced on the date last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall constitute the Beaumont division; also the territory embraced on the date last mentioned in the counties of Collin, Cook, Denton, Grayson, and Montague, which shall constitute the Sherman division; also the territory embraced on the date last mentioned in the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which shall constitute the Jefferson division; also the territory embraced on the date last mentioned in the counties of Delta, Fannin, Red River, and Lamar, which shall constitute the Paris division; also the territory embraced on the date last mentioned in the counties of Bowie, Franklin, and Titus, which shall constitute the Texarkana division. Terms of the district court for the Tyler division shall be held at Tyler on the fourth Mondays in January and April; for the Jefferson division, at Jefferson on the first Monday in October and the third Monday in February; for the Beaumont division, at Beaumont on the third Monday in November and the first Monday in April; for the Sherman division, at Sherman on the first Monday in January and the third Monday in May; for the Paris division, at Paris on the third Monday in October and the first Monday in March; and for the Texarkana division at Texarkana on the third Monday in March and the first Monday in November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Sherman, at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the Austin division; also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the San Antonio division; also the territory embraced on the date last mentioned in the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward, and Winkler, which shall constitute the El Paso division; also the territory embraced on the date last mentioned in the counties of

Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milan, Robertson, and Somervell, which shall constitute the Waco division; also the territory embraced on the date last mentioned in the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the Del Rio division. Terms of the district court for the Austin division shall be held at Austin on the fourth Monday in January and the second Monday in June; for the Waco division on the fourth Monday in February and the second Monday in November; for the San Antonio division, at San Antonio on the first Monday in May and the third Monday in December; for the El Paso division, at El Paso on the first Monday in April and the first Monday in October; and for the Del Rio division, at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Austin, at El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The southern district shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which shall constitute the Laredo division; also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the Brownsville division; also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the Galveston division; also the territory embraced on the date last mentioned, in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall constitute the Houston division; also the territory embraced on the date last mentioned, in the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio, and Victoria, which shall constitute the Victoria division. Terms of the district court for the Galveston division shall be held at Galveston on the second Monday in January and the first Monday in June; for the Houston division, at Houston on the fourth Mondays in February and September; for the Laredo division, at Laredo on the third Monday in April and the second Monday in November; for the Brownsville division, at Brownsville on the second Monday in May and the first Monday in December; and for the Victoria division, at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court

for the southern district shall maintain an office in charge of himself or a deputy at each of the places now designated for holding court in said district.

By Act of May 29, 1912, c 144 (37 Stat. L. 120), it was provided "That the counties of Bee, Live Oak, Arkansas, San Patricio, Nueces, Jim Wells, Duval, Brooks, and Willacy shall constitute a division of the southern judicial district of Texas, also that the terms of the district court for the southern district of Texas shall be held twice a year at Corpus Christi at times to be fixed by the judge of the court."

By Act of Feb. 5, 1913, c. 28 (37 Stat. L. 663), it was provided "That the counties of Reeves, Ward, Martin, Reagan, Winkler, Ector, Gaines, Andrews, Upton, Midland, Loving, Jeff Davis, and Crane shall constitute a division of the western judicial district of Texas, and that terms of the district court for the western district shall be held twice a year at Pecos at times to be fixed by the judge."

By the Act of Feb. 26, 1917, c. 122 (39 Stat. L. 939), an additional division in the northern judicial district of Texas was provided for, consisting of the counties of Archer, Baylor, Clay, Cottle, Foard, Montague, King, Knox, Wichita, Wilbarger and Young. The terms of this court are to be held at Wichita Falls on the fourth Monday in March and the third Monday in November.

The Act of March 16, 1919, c. 87 (40 Stat. L. 1270), it was provided that there should be terms of court at Amarillo, Texas, on the third Monday in April and the second Monday in September.

§ 109. The state of Utah shall constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the northern and central divisions. The northern division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The central division shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne. Terms of the district court for the northern division shall be held at Ogden on the second Mondays in March and September; and for the central division, at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district.

§ 110. The state of Vermont shall constitute one judicial district, to be known as the district of Vermont. Terms of the district

court shall be held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October, and at Brattleboro on the third Tuesday in December. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier, and one at Newport: *Provided, however,* That suitable rooms and accommodations shall be furnished for the holdings of said court and for the use of the officers of said court at Brattleboro free of expense to the Government of the United States until the public building provided for by Act of Congress shall be erected.

Amended by the Act of Feb. 1, 1912, c. 26 (37 Stat. L. 58).

§ 111. The state of Virginia is divided into two districts, to be known as the eastern and western districts of Virginia. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York. Terms of the district court shall be held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November; and at Alexandria, on the first Mondays in January and July. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe. Terms of the district court shall be held at Lynchburg on the second Mondays in January and July; at Roanoke on the second Monday in February and the first Monday in August; at

Danville on the second Monday in March and the third Monday in September; at Charlottesville, on the second Mondays in April and November; at Harrisonburg on the fourth Mondays in April and November; at Big Stone Gap on the third Monday in May and the second Monday in October; and at Abingdon on the second Mondays in June and December.

The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Lynchburg, Roanoke, Danville, Charlottesville, Harrisonburg, Big Stone Gap, and Abingdon, which shall be kept open at all times for the transaction of the business of the court.

Amended by the Act of June 13, 1918, c. 99 (40 Stat. L. 605-606).

§ 112. The state of Washington is divided into two districts, to be known as the eastern and western districts of Washington. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Spokane on the first Tuesdays in April and September; for the southern division, at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the

southern division, at Tacoma on the first Tuesdays in February and July. The clerks of courts for the eastern and western districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held.

§ 113. The state of West Virginia is divided into two districts, to be known as the northern and southern districts of West Virginia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley and Jefferson, with the waters thereof. Terms of the district court for the northern district shall be held at Martinsburg, the first Tuesday of April and the third Tuesday of September; at Clarksburg, the second Tuesday of April and the first Tuesday of October; at Wheeling, the first Tuesday of May and the third Tuesday of October; at Philippi, the fourth Tuesday of May and second Tuesday of November; at Elkins on the first Tuesday in July and the first Tuesday in December; and at Parkersburg, the second Tuesday of January and second Tuesday of June: *Provided,* That a place for holding court at Philippi shall be furnished the Government free of cost by Barbour County until other provision is made therefor by law. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday of June and the third Tuesday of November; at Huntington, on the first Tuesday of April and the first Tuesday after the third Monday of September; at Bluefield on the first Tuesday of May and the third Tuesday of October; at Williamson on the first Tuesday of October; at Webster Springs on the first Tuesday of September; and at Lewisburg on the second Tuesday of July: *Provided,* That a place for holding court at Webster Springs shall be furnished free of cost to the United States: *And provided further,* That a place for holding court at Williamson shall be furnished free of cost to the

United States by Mingo County until other provision is made therefor by law.

Amended by the Acts of March 23, 1912, c. 63 (37 Stat. L. 76), and Aug. 22, 1914, c. 265 (38 Stat. L. 702).

§ 114. The state of Wisconsin is divided into two districts, to be known as the eastern and western districts of Wisconsin. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara and Winnebago. Terms of the district court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn and Wood. Terms of the district court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The district court for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior, may be made returnable at Superior; and the clerk at that place shall keep in his office the original records of all actions, prosecutions and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within

the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers and orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial.

§ 115. The state of Wyoming and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided*, That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the Government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park.

CHAPTER VI

CIRCUIT COURTS OF APPEALS

§ 116. Circuits.
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§ 135. Appeals and writs of error from Alaska—Where heard.

§ 116. There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, Maine and Porto Rico.

Second. The second circuit shall include the districts of Vermont, Connecticut and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana and Hawaii.

Porto Rico was added to the first circuit by the Act of Jan. 28, 1915, c. 22 (38 Stat. L. 803).

By the Act of June 20, 1910, c. 310 (36 Stat. L. 557, 565, 573). New Mexico was added to the eighth circuit and Arizona to the ninth circuit.

§ 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute

a quorum, and which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

§ 118. There shall be in the second, seventh and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary of $8,500 a year, each, payable monthly. Each circuit judge shall reside within his circuit. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided,* That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided for and authorized in other sections of this Act.

Amended by the Acts of Jan. 13, 1912, c. 9 (37 Stat. L. 52), and Feb. 25, 1919, c. 29 (40 Stat. L. 1157).

§ 119. The chief justice and associate justices of the supreme court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the chief justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the chief justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit.

§ 120. The chief justice and the associate justices of the supreme court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the chief justice or an associate justice of the supreme court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such chief justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the

full court at any time shall not be made up by the attendance of the chief justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

§ 121. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the supreme court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

§ 122. Each of said circuit courts of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

§ 123. The United States marshals in and for the several districts of said courts shall be the marshals of said circuit courts of appeals, and shall exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable.

§ 124. Each court shall appoint a clerk, who shall exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the supreme court, so far as the same may be applicable.

§ 125. The clerk of the circuit court of appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk

is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

§ 126. A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: *Provided,* That terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the state of Georgia, in the state of Texas and in the state of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the District Court of the United States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans: *Provided,* That nothing herein shall prevent the court from hearing appeals or writs of error wherever

the said courts shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the District Courts of the United States in the states of Colorado, Utah and Wyoming, and the Supreme Court of the territory of New Mexico to the circuit court of appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said states or territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne.

By the Act of July 17, 1916, c. 246 (39 Stat. L. 385), it was provided that a term of the Circuit Court of Appeals for the Fourth Circuit should be held at Asheville, North Carolina, annually at a time fixed by the judges of said court.

§ 127. The marshals for the several districts in which said circuit courts of appeals may be held shall, under the direction of the attorney general, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs and messengers: *Provided,* That in case proper rooms can not be provided in such buildings, then the marshals, with the approval of the attorney general, may, from time to time, lease such rooms as may be necessary for such courts.

§ 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii, and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the supreme court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under

the revenue laws, and under the criminal laws, and in admiralty cases.

Amended by the Act of Jan. 28, 1915, c. 22 (38 Stat. L. 803).

§ 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the supreme court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond.

§ 130. The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed.

§ 131. The circuit court of appeals for the ninth district is empowered to hear and determine writs of error and appeals from the United States court for China, is provided in the act entitled "An Act creating a United States court for China and prescribing the jurisdiction thereof," approved June thirtieth, nineteen hundred and six.

§ 132. Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

§ 133. The circuit courts of appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the supreme courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders and decrees of the district courts; and for that purpose said territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits.

Superseded by the Act of June 20, 1910, c. 310 (36 Stat. L. 557, 565, 576).

§ 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the supreme court, and thereupon the supreme court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals.

§ 135. All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided,* That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there.

CHAPTER VII

THE COURT OF CLAIMS

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§ 136. The court of claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of $8,000, and each of the other judges an annual salary of $7,500, payable monthly from the treasury.

Amended by the Act of Feb. 25, 1919, c. 29 (40 Stat. L. 1157).

§ 137. The court of claims shall have a seal, with such device as it may order.

§ 138. The court of claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided*, That the concurrence of three judges shall be necessary to the decision of any case.

§ 139. The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a chief messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

§ 140. The salary of the chief clerk shall be three thousand five hundred dollars a year; of the assistant clerk two thousand five hundred dollars a year; of the bailiff one thousand five hundred dollars a year, and of the chief messenger one thousand dollars a year, payable monthly from the treasury.

§ 141. The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the secretary of the treasury.

§ 142. The said clerk shall have authority when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the treasury in the same way as the accounts of other disbursing agents of the Government are settled.

§ 143. On the first day of every regular session of Congress, the clerk of the court of claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the solicitor, the comptroller, and the auditors of the Treasury; to the commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.

§ 144. Whoever, being elected or appointed a senator, member of, or delegate to Congress, or a resident commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in the court of claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust or profit under the Government of the United States.

§ 145. The court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

The following provision is made by the Act of March 4, 1915, c. 140 (38 Stat. L. 996):

From and after the passage and approval of this act the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States based upon or growing out of the destruction of any property or damage done to any property by the military or naval forces of the United States during the War for the suppression of the rebellion; nor to any claim for stores and supplies taken by or furnished to or for the use of the military or naval forces of the United States, nor to any claim for the value of any use and occupation of any real estate by the military or naval forces of the United States during said War; nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provision of any law of the United States.

§ 146. Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.

§ 147. Whenever the court of claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.

§ 148. When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto, to the court of claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The secretary of the Treasury may, upon the certificate of any auditor, or of the comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject

matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication.

§ 149. All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the court of claims, and shall, in all respects, be subject to the same rules and regulations.

§ 150. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the court of claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

§ 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the court of claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however*, That if it shall appear to the satisfaction of the court upon the facts established that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such

further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

§ 152. If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

§ 153. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

See the Act of March 3, 1919, c. 103 (40 Stat. L. 1316-1317), which confers jurisdiction on the Court of Claims to hear certain claims of the Cherokee Nation against the United States.

§ 154. No person shall file or prosecute in the court of claims, or in the supreme court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

§ 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

§ 156. Every claim against the United States cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one

years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

§ 157. The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

§ 158. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.

§ 159. The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney.

§ 160. The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed.

§ 161. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or government of the late Confederate states during the civil war, the claimant asserting the loyalty of any such person to the United States during such civil war shall be required to prove affirmatively that such person did, during said civil war, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said civil war.

§ 162. The court of claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled "An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," and acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding.

§ 163. The court of claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.

§ 164. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

§ 165. When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground

for relief, it shall not authorize the taking of any testimony therein.

§ 166. The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

§ 167. The testimony in cases pending before the court of claims shall be taken in the county where the witness resides, when the same can be conveniently done.

§ 168. The court of claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

§ 169. In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

§ 170. The commissioner taking testimony to be used in the court of claims shall administer an oath or affirmation to the witnesses brought before him for examination.

§ 171. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the Government, such fees shall be paid out of the contingent fund provided for the court of claims, or other appropriation made by Congress for that purpose.

§ 172. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance of any claim or of any part of any claim against the United States shall, *ipso facto,* forfeit the same to the Government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.

§ 173. No claim shall be allowed by the accounting officers under the provisions of the Act of Congress approved June sixteenth, eighteen hundred and seventy-four, or by the court of claims, or by Congress, to any person where such claimant, or those under whom he claims, shall willfully, knowingly, and with intent to defraud the United States, have claimed more than was justly due in respect of such claim, or presented any false evidence to Congress, or to any department or court, in support thereof.

§ 174. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

§ 175. The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

§ 176. There shall be taxed against the losing party in each and every cause pending in the court of claims the cost of printing

the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States.

§ 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest.

§ 178. The payment of the amount due by any judgment of the court of claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

§ 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

§ 180. Whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the attorney general of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The attorney general shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of

the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section.

§ 181. The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

§ 182. In any case brought in the court of claims under any act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

§ 183. The attorney general shall report to Congress, at the beginning of each regular session, the suits under section 180, in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case.

§ 184. In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late civil war, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the Government of the United States, and the fact of such loy-

alty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the Government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

§ 185. The attorney general, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the court of claims under the provisions of this chapter, with the same power to interpose counter claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is required to defend the United States in said court.

§ 186. No person shall be excluded as a witness in the court of claims on account of color or because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

Amended by the Act of Feb. 5, 1912, c. 28 (37 Stat. L. 61).

§ 187. Reports of the court of claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon.

CHAPTER VIII

THE COURT OF CUSTOMS APPEALS

§ 188. Court of Customs Appeals—Appointment and salary of judges—Quorum—Circuit and district judges may act in place of judge disqualified, etc.
§ 189. Court to be always open for business—Terms may be held in any circuit—When expenses of judges to be paid.
§ 190. Marshal of the court—Appointment, salary, and duties.
§ 191. Clerk of the court—Appointment, salary, and duties.
§ 192. Assistant clerk, stenographic clerks, and reporter—Appointment, salary, and duties.
§ 193. Rooms for holding court to be provided—Bailiffs and messengers.

§ 194. To be a court of record—To prescribe form and style of seal, and establish rules and regulations—May affirm, modify, or reverse and remand case, etc.
§ 195. Final decisions of Board of General Appraisers to be reviewed only by Customs Court.
§ 196. Other courts deprived of jurisdiction in customs cases—Pending cases excepted.
§ 197. Transfer to Customs Court of pending cases—Completion of testimony.
§ 198. Appeals from Board of General Appraisers—Time within which to be taken—Record to be transmitted to customs court.
§ 199. Records filed in Customs Court to be at once placed on calendar—Calendar to be called every sixty days.

§ 188. There shall be a United States court of customs appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reasons, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.

By the Act of Feb. 25, 1919, c. 29 (40 Stat. L. 1157) it was provided that the judges of the United States Court of Customs Appeals should receive the same salary as that given to the judges of the Circuit Court of Appeals, that is $8,500 a year.

§ 189. The said court of customs appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him; and such payments shall be al-

lowed the marshal in the settlement of his accounts with the United States.

§ 190. Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be the marshals of said court. The marshal of said court, for the District of Columbia, is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the secretary of the treasury upon claim duly made and approved by said presiding judge.

§ 191. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which shall be in full payment for all service rendered by such clerk; and all fees of any kind whatever, and all costs shall be by him turned into the United States treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the supreme court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the supreme court of the United States; and the same shall be expended, accounted for, and paid over to the treasury of the United States.

§ 192. In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the secretary of the Treasury shall direct.

§ 193. The marshal of said court for the District of Columbia and the marshals of the several districts in which said court of customs appeals may be held shall, under the direction of the attorney general, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided,* That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the attorney general, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such cannot, by reason of actual occupancy or use, be occupied or used by said court of customs appeals.

§ 194. The said court of customs appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its

jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

§ 195. The court of customs appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collections of the customs revenues; and the judgments and decrees of said court of customs appeals shall be final in all such cases: *Provided, however,* That in any case in which the judgment or decree of the court of customs appeals is made final by the provisions of this title, it shall be competent for the supreme court, upon the petition of either party, filed within sixty days next after the issue by the court of customs appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall, before the decision of the court of customs appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the supreme court, to require, by certiorari or otherwise, such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court: *And provided further,* That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, nor to any case involving the construction of section two of an Act entitled "An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," approved July 26, 1911.

Amended by the Act of August 22, 1914, c. 267 (38 Stat. L. 703).

§ 196. After the organization of said court, no appeal shall be taken or allowed from any board of United States general appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said board of United States general appraisers; but all appeals allowed by law from such board of general appraisers shall be subject to review only in the court of customs appeals hereby established, according to the provisions of this chapter: *Provided,* That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August 5, 1909: *Provided further,* That all customs cases decided by a circuit or district court of the United States or a court of a territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed.

§ 197. Immediately upon the organization of the court of customs appeals, all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said court of customs appeals for further proceedings in accordance herewith: *Provided,* That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

§ 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or secretary of the treasury, shall be dissatisfied with the decision of the board of general appraisers as to the construction of the law and the facts respecting

the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the court of customs appeals for a review of the questions of law and fact involved in such decision: *Provided,* That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the court of customs appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the board of general appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said court of customs appeals. The decision of said court of customs appeals shall be final, and such cause shall be remanded to said board of general appraisers for further proceedings to be taken in pursuance of such determination.

§ 199. Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided,* That such calendar need not be called during the months of July and August of any year.

CHAPTER IX*

THE COMMERCE COURT

§ 200. Commerce Court created—Judges of, appointment and designation—Expense allowance to judges.
§ 201. Additional circuit judges—Appointment and assignment.
§ 202. Officers of the court—Clerk, marshal, etc.—Salaries, etc.

*This chapter is obsolete, the Commerce Court having been abolished by Act of Oct. 22, 1913, c. 32 (38 Stat. L. 219).

§ 203. Court to be always open for business—Sessions of, to be held in Washington and elsewhere.
§ 204. Marshals to provide rooms for holding court outside of Washington.
§ 205. Assignment of judges to other duty—Vacancies, how filled.
§ 206. Powers of court and judges—Writs, process, procedure, etc.
§ 207. Jurisdiction of the court.
§ 208. Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States—Restraining orders, when granted without notice.
§ 209. Jurisdiction of the court, how invoked—Practice and procedure.
§ 210. Final judgments and decrees reviewable in Supreme Court.
§ 211. Suits to be against United States—When United States may intervene.
§ 212. Attorney General to control all cases—Interstate Commerce Commission may appear as of right—Parties interested may intervene, etc.
§ 213. Complainants may appear and be made parties to case.
§ 214. Pending cases to be transferred to Commerce Court—Exception—Status of transferred cases.

§ 200. There shall be a court of the United States, to be known as the commerce court, which shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The said court shall be composed of five judges, to be from time to time designated and assigned thereto by the chief justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges referred to in the next succeeding section, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the chief justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the commerce court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five-year period shall be the presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge. The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge, whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a quorum, and at least a majority of

the court shall concur in all decisions. Each of the judges during the period of his service in the commerce court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum.

§ 201. The five additional circuit judges authorized by the Act to create a commerce court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the chief justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the commerce court, and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.

§ 202. The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the supreme court of the United States. The offices of the clerk and marshal of the court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal, shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the supreme court of the United States, within four months after the organization of the court; but such costs and fees shall in no case exceed those charged in the supreme court of the United States, and shall be accounted for and paid into the treasury of the United States.

§ 203. The commerce court shall always be open for the transaction of business. Its regular sessions shall be held in the city

of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal, may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal, by the marshal of the court, and shall be allowed to him in the settlement of his accounts with the United States.

§ 204. The United States marshals of the several districts outside of the city of Washington in which the commerce court may hold its sessions shall provide, under the direction and with the approval of the attorney general, such rooms in the public buildings of the United States as may be necessary for the court's use; but in case proper rooms cannot be provided in such public buildings, said marshals, with the approval of the attorney general, may then lease from time to time other necessary rooms for the court.

§ 205. If, at any time, the business of the commerce court does not require the services of all the judges, the chief justice of the United States may, by writing, signed by him and filed in the department of justice, terminate the assignment of any of the judges or temporarily assign him for service in any district court or circuit court of appeals. In case of illness or other disability of any judge assigned to the commerce court the chief justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.

§ 206. In all cases within its jurisdiction the commerce court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The commerce court may issue all

writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the district courts of the United States.

§ 207. The commerce court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the states," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.

The jurisdiction of the commerce court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the

United States over cases or proceedings of a kind not within the above-enumerated classes.

§ 208. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the commerce court otherwise than upon notice and after hearing, except that in case where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the attorney general, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

§ 209. The jurisdiction of the commerce court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the commerce court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the department of justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office,

and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the commerce court shall conform as nearly as may be to that in like cases in a district court of the United States.

§ 210. A final judgment or decree of the commerce court may be reviewed by the supreme court of the United States if appeal to the supreme court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the supreme court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The supreme court may affirm, reverse, or modify the final judgment or decree of the commerce court as the case may require. Appeal to the supreme court, however, shall in no case supersede or stay the judgment or decree of the commerce court appealed from, unless the supreme court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the supreme court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the supreme court of the United States from an interlocutory order or decree of the commerce court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the supreme court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

§ 211. All cases and proceedings in the commerce court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the commerce court whenever, though it has not been made a party, public interests are involved.

§ 212. The attorney general shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court, and in the supreme court of the United States upon appeal from the commerce court. If in his oipnion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordiate attorneys; and the attorney general shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the attorney general shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or

continue said suit or proceeding unaffected by the action or non-action of the attorney general therein.

§ 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

§ 214. Until the opening of the commerce court, all cases and proceedings of which from that time the commerce court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the commerce court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the commerce court which may have been begun in any other court as hereby allowed, before the said date, shall be forthwith transferred to the commerce court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the supreme court; and if remanded, such cause may be sent back to the court from which the appeal was taken or to the commerce court for further proceeding as the supreme court shall direct. All previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the commerce court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the commerce court. The clerk of the court from which any case or proceeding is so transferred to the commerce court shall transmit to and file in the commerce court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

CHAPTER X

THE SUPREME COURT

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§ 252. Appellate jurisdiction under the bankruptcy act.

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§ 215. The Supreme Court of the United States shall consist of a chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

§ 216. The associate justices shall have precedence according to the dates of their commissions, or when the commissions of two or more of them bear the same date, according to their ages.

§ 217. In case of a vacancy in the office of chief justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another chief justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of chief justice.

§ 218. The chief justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly.

§ 219. The supreme court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions.

§ 220. The clerk of the supreme court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars, to be determined and regulated by the attorney general, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The supreme court may at any time, upon the motion of the attorney general, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice.

§ 221. One or more deputies of the clerk of the supreme court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

§ 222. The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the supreme court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the supreme court; and such copies shall have like faith and credit with all other proceedings of said court.

§ 223. The supreme court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof.

§ 224. The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the chief justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the chief justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

§ 225. The reporter shall cause the decisions of the supreme court to be printed and published within eight months after they are made; and within the same time he shall deliver three hundred copies of the volumes of said reports to the attorney general. The reporter shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time.

§ 226. The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars: *Provided,* That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the attorney general shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume.

§ 227. The attorney general shall distribute copies of the supreme court reports, as follows: To the President, the justices of the supreme court, the judges of the commerce court, the judges of the court of customs appeals, the judges of the circuit courts of appeals, the judges of the district courts, the judges of the court of claims, the judges of the court of appeals and of the Supreme Court of the District of Columbia, the judges of the several territorial courts, the secretary of State, the secretary of the Treasury, the secretary of War, the secretary of the Navy, the secretary of the Interior, the postmaster general, the attorney general, the secretary of Agriculture, the secretary of Commerce and Labor, the solicitor general, the assistant to the attorney general, each assistant attorney general, each United States district attorney, each assistant secretary of each executive department, the assistant postmasters general, the secretary of the Senate for the use of the Senate, the clerk of the House of Representatives for the use of the House of Representatives, the governors of the territories, the solicitor for the Department of State, the treasurer of the United States, the solicitor of the Treasury, the register of the Treasury, the comptroller of the Treasury, the comptroller of the Currency,

the commissioner of Internal Revenue, the director of the Mint, each of the six auditors in the Treasury Department, the judge advocate general, War Department, the paymaster general, War Department, the judge advocate general, Navy Department, the commissioner of Indian affairs, the commissioner of pensions, the commissioner of the General Land Office, the commissioner of Patents, the commissioner of Education, the commissioner of Labor, the commissioner of Navigation, the commissioner of Corporations, the commissioner general of Immigration, the chief of the Bureau of Manufactures, the director of the Geological Survey, the director of the Census, the forester, Department of Agriculture, the purchasing agent, Postoffice Department, the Interstate Commerce Commission, the clerk of the Supreme Court of the United States, the marshal of the Supreme Court of the United States, the attorney for the District of Columbia, the Naval Academy at Annapolis, the Military Academy at West Point, and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; to the Law Library of the Supreme Court, twenty-five copies; to the Law Library of the Department of the Interior, two copies; to the Law Library of the Department of Justice, two copies; to the secretary of the Senate for the use of the committees of the Senate, twenty-five copies; to the clerk of the House of Representatives for the use of the committees of the House, thirty copies; to the marshal of the Supreme Court of the United States, as custodian of the public property used by the court, for the use of the justices thereof in the conference room, robing room, and court room, three copies; to the secretary of War for the use of the proper courts and officers of the Philippine Islands and for the headquarters of military departments in the United States, twelve copies; and to each of the places where district courts of the United States are now holden, including Hawaii, and Porto Rico, one copy. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such executive officers as are entitled to receive said reports under this section and have not already received them, to each United States judge and to each United States district attorney who has not received a set, to each of the places where district courts are now held to which said reports have not been distributed, and to each of the places at which a district court may hereafter be held, the edition of said reports and digests to be selected by the judge or officer receiving them. No distribution of reports and digests under this section shall be

made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of said courts (except the supreme court) shall in all cases keep said reports and digest for the use of the courts and of the officers thereof. Such reports and digest shall remain the property of the United States, and shall be preserved by the officers above named and by them turned over to their successors in office.

By the Act of March 4, 1911, c. 285 (36 Stat. L. 1419), the Secretary of the Interior distributes reports of the Supreme Court to the Circuit Courts of Appeals.

§ 228. The publishers of the decisions of the supreme court shall deliver to the attorney general, in addition to the three hundred copies delivered by the reporter, such number of copies of each report heretofore published, as the attorney general may require, for which he shall pay not more than two dollars per volume, and such number of copies of each report hereafter published as he may require, for which he shall pay not more than one dollar and seventy-five cents per volume. The attorney general shall include in his annual estimates submitted to Congress, an estimate for the current volumes of such reports, and also for the additional sets of reports and digests required for distribution under the section last preceding.

§ 229. The attorney general is authorized to procure complete sets of the Federal Reporter or, in his discretion, other publication containing the decisions of the circuit courts of appeals, circuit courts, and district courts, and digests thereof, and also future volumes of the same as issued, and distribute a copy of each such report and digest to each place where a circuit court of appeals, or a district court, is now or may hereafter regularly be held, and to the Supreme Court of the United States, the court of claims, the court of customs appeals, the commerce court, the court of appeals and the Supreme Court of the District of Columbia, the attorney general, the solicitor general, the solicitor of the Treasury, the assistant attorney general for the Department of the Interior, the commissioner of Patents, and the Interstate Commerce Commission; and to the secretary of the Senate, for the use of the Senate, and to the clerk of the House of Representatives, for the use of the House of Representatives, not more than three sets each. Whenever any such court room, office, or officer

shall have a partial or complete set of any such reports, or digests, already purchased or owned by the United States, the attorney general shall distribute to such court room, office or officer, only sufficient volumes to make a complete set thereof. No distribution of reports or digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of the courts (except the supreme court) to which the reports and digests are distributed under this section, shall keep such reports and digests for the use of the courts and the officers thereof. All reports and digests distributed under the provisions of this section shall be and remain the property of the United States and, before distribution, shall be plainly marked on their covers with the words "The Property of the United States," and shall be transmitted by the officers receiving them to their successors in office. Not to exceed two dollars per volume shall be paid for the back and current volumes of the Federal Reporter or other publication purchased under the provisions of this section, and not to exceed five dollars per volume for the digest, the said money to be disbursed under the direction of the attorney general; and the attorney general shall include in his annual estimates submitted to Congress, an estimate for the back and current volumes of such reports and digests, the distribution of which is provided for in this section.

§ 230. The supreme court shall hold at the seat of government, one term annually, commencing on the first Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business.

Amended by the Act of Sept. 6, 1916, c. 448 (39 Stat. L. 726).

§ 231. If, at any session of the supreme court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days until after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

§ 232. The justices attending at any term, when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof.

§ 233. The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

§ 234. The supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador, or other public minister, or a consul, or vice consul is a party.

§ 235. The trial of issues of fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury.

§ 236. The supreme court shall have appellate jurisdiction in the cases hereinafter specially provided for.

§ 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in

the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.

It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.

Amended by the Acts of Dec. 23, 1914, c. 2 (38 Stat. L. 790), and Sept. 6, 1916, c. 448 (39 Stat. L. 726).

§ 238. Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

Amended by the Act of Jan. 28, 1915, c. 22 (38 Stat. L. 804).

§ 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

§ 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title it shall be competent for the supreme court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

§ 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

§ 242. An appeal to the supreme court shall be allowed on behalf of the United States, from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.

§ 243. All appeals from the court of claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the supreme court may direct.

§ 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States District

Court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts.

Repealed by the Act of Jan. 28, 1915, c. 22 (38 Stat. L. 804).

§ 245. Writs of error and appeals from the final judgments and decrees of the supreme courts of the territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

§ 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court of the territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a state in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon

the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ or error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree.

Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals.

Amended by the Act of January 28, 1915, c. 22 (38 Stat. L. 804).

§ 247. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the supreme court.

§ 248. The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value of the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, re-

versed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States.

See the Act of Aug. 29. 1916, c. 416; § 27 (39 Stat. L. 555) and the Act of September 6, 1916, c. 448, § 5 (39 Stat. L. 727).

§ 249. In all cases where the judgment or decree of any court of a territory might be reviewed by the supreme court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such territory has, after such judgment or decree, been admitted as a state; and the supreme court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

§ 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reëxamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said supreme court, then the question of jurisdiction alone shall be certified to said supreme court for decision.

Second. In prize cases.

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

Fourth. In cases in which the constitution, or any law of a state, is claimed to be in contravention of the Constitution of the United States.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and de-

crees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States.

§ 251. In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said supreme court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

§ 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

An appeal may be taken to the Supreme Court of the United States from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said supreme court, in the following cases and no other:

First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which

might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or

Second. Where some justice of the supreme court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

§ 253. Cases on writ of error to revise the judgment of a state court in any criminal case shall have precedence on the docket of the supreme court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

§ 254. There shall be taxed against the losing party in each and every cause pending in the supreme court the cost of printing the record in such case, except when the judgment is against the United States.

§ 255. Any woman who shall have been a member of the bar of the highest court of any state or territory, or of the Court of Appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

CHAPTER XI

PROVISIONS COMMON TO MORE THAN ONE COURT

§ 256. Cases in which jurisdiction of United States courts shall be exclusive of States courts.
§ 257. Oath of United States judges.
§ 258. Judges prohibited from practicing law.
§ 259. Traveling expenses, etc., of circuit justices and circuit and district judges.

§ 260. Salary of judges after resignation.
§ 261. Writs of ne exeat.
§ 262. Power to issue writs.
§ 263. Temporary restraining orders.
§ 264. Injunctions—In what cases judge may grant.
§ 265. Injunctions to stay proceedings in State courts.
§ 266. Injunctions based upon alleged unconstitutionality of State statutes—When and by whom may be granted.
§ 267. When suits in equity may be maintained.
§ 268. Power to administer oaths and punish contempts.
§ 269. New trials.
§ 270. Power to hold to security for the peace and good behavior.
§ 271. Power to enforce awards of foreign consuls, etc., in certain cases.
§ 272. Parties may manage their causes personally or by counsel.
§ 273. Certain officers forbidden to act as attorneys.
§ 274. Penalty for violating preceding section.
§ 274a. Amendment of suit brought on wrong side of court.
§ 274b. Equitable defenses interposed in actions at law.
§ 274c. Amendment where diverse citizenship is defectively alleged.

§ 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any state.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

Amended by the Act of Oct. 6, 1917, c. 97 (40 Stat. L. 395).

§ 257. The justices of the supreme court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ———— ————, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ———— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

§ 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

§ 259. The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the commerce court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence.

§ 260. That when any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having

attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake, or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake. In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years continuously, and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds that any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy

caused by such death, resignation or retirement of the said judge so entitled to resign shall not be filled.

Amended by the Act of Feb. 25, 1919, c. 29 (40 Stat. L. 1157-1158).

§ 261. Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

§ 262. The supreme court and the district courts shall have power to issue writs of *scire facias*. The supreme court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

§ 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

Repealed by the Act of October 15, 1914, c. 323 (38 Stat. L. 737).

§ 264. Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it can not be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

§ 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

§ 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the supreme court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the supreme court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the supreme court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided

for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state court is not being prosecuted with diligence and good faith.

Amended by the Act of March 4, 1913, c. 150 (37 Stat. L. 1013).

§ 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

§ 268. The said court shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

§ 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

§ 270. The judges of the supreme court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several states, who are or may be authorized by law to make arrests for offenses against

the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them.

§ 271. The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however*, That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

§ 272. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

§ 273. No clerk, or assistant or deputy clerk, of any territorial, district, or circuit court of appeals, or of the court of claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer.

§ 274. Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

§ 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

§ 274b. That in actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such cases as if he had filed a bill embodying the defense of [or?] seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

§ 274c. That where, in any suit brought in or removed from any state court to any district [court?] of the United States, the juris-

diction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removal case, in the petition for removal.

CHAPTER XII

JURIES

§ 275. Qualification and exemptions of jurors.
§ 276. Jurors, how drawn.
§ 277. Jurors, how to be apportioned in the district.
§ 278. Race or color not to exclude.
§ 279. Venire, how issued and served.
§ 280. Talesmen for petit juries.
§ 281. Special juries.
§ 282. Number of grand jurors.
§ 283. Foreman of grand jury.
§ 284. Grand juries, when summoned.
§ 285. Discharge of grand juries.
§ 286. Jurors not to serve more than once a year.
§ 287. Challenges.
§ 288. Persons disqualified for service on jury in prosecutions for polygamy, etc.

§ 275. Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

§ 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly

qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk or a duly qualified deputy clerk then acting; may belong, the clerk or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Amended by the Act of Feb. 3, 1917, c. 27 (39 Stat. L. 873).

§ 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

§ 278. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.

§ 279. Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the postoffice addressed to such person at his usual postoffice address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts.

§ 280. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

§ 281. When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.

§ 282. Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the by-standers, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

§ 283. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

§ 284. No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein

shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found.

§ 285. The district courts, the district courts of the territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

§ 286. No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

§ 287. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.

§ 288. In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman—

First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or three of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy and for other purposes," approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the

Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two entitled, "An Act to punish and prevent the practice of polygamy in the territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the territory of Utah;" or

Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabitating with more than one woman.

Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.

CHAPTER XIII

GENERAL PROVISIONS

§ 289. Circuit courts abolished—Records of to be transferred to district courts.
§ 290. Suits pending in circuit courts to be disposed of in district courts.
§ 291. Powers and duties of circuit courts imposed upon district courts.
§ 292. References to laws revised in this act deemed to refer to sections of act.
§ 293. Sections 1 to 5, Revised Statutes, to govern construction of this act.
§ 294. Laws revised in this act to be construed as continuations of existing laws.
§ 295. Inference of legislative construction not to be drawn by reason of arrangement of sections.
§ 296. Act may be designated as "The Judicial Code."

§ 289. The circuit courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and

other books and papers of or belonging to or in any manner connected with said circuit courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this Act.

§ 290. All suits and proceedings pending in said circuit courts on the date of the taking effect of this Act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided.

§ 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

§ 292. Wherever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made.

§ 293. The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this Act. The words "this title," wherever they occur herein, shall be construed to mean this Act.

§ 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

§ 295. The arrangement and classification of the several sections of this Act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed.

§ 296. This Act may be designated and cited as "The Judicial Code."

CHAPTER XIV

REPEALING PROVISIONS

§ 297. Sections, acts, and parts of acts repealed.
§ 298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.
§ 299. Accrued rights, etc., not affected.
§ 300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.
§ 301. Date this act shall be effective.

§ 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; section five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight

hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An Act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes," approved March third, eighteen hundred and seventy-five.

Section five of an Act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven and eight of said Act, and sections one, two and twenty-six of an Act entitled "An Act to amend an Act entitled 'An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," approved March third, eighteen hundred and eighty-seven, and hereby continued in force.

"An Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act regulating appeals from the Supreme Court of the District of Columbia and the supreme courts of the several territories," approved March third, eighteen hundred and eighty-five.

"An Act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven and ten thereof.

Sections one, two, three, four, six and seven of an Act entitled "An Act to correct the enrollment of an Act approved March third, eighteen hundred and eighty-seven, entitled 'An Act to amend sections one, two, three and ten of an Act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes,' approved March third, eighteen hundred and seventy-five," approved August thirteenth, eighteen hundred and eighty-eight.

"An Act to withdraw from the supreme court jurisdiction of criminal cases not capital and confer the same on the circuit

courts of appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An Act to amend sections one and two of the Act of March third, eighteen hundred and eighty-seven, Twenty-fourth Statutes at Large, Chapter three hundred and fifty-nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An Act to amend the seventh section of the Act entitled 'An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, and the several Acts amendatory thereto," approved April fourteenth, nineteen hundred and six.

All Acts and parts of Acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, and section seventeen of an Act entitled "An Act to create a commerce court, and to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten.

Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.

§ 298. The repeal of existing laws providing for the appointment of judges and other officers mentioned in this Act, or affecting the organization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished) shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law.

§ 299. The repeal of existing laws, or the amendments thereof, embraced in this Act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those

pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this Act, pending at the time of the taking effect of this Act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made.

§ 300. All offenses committed, and all penalties, forfeitures or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this Act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this Act had not been passed.

§ 301. This Act shall take effect and be in force on and after January first, nineteen hundred and twelve.

Approved March 3, 1911.

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238	Mar. 3, 1911	231	238	36	1157	1215	1215	704	231
239	Mar. 3, 1911	231	239	36	1157	1216	1216	723	231
240	Mar. 3, 1911	231	240	36	1157	1217	1217	727	232
241	Mar. 3, 1911	231	241	36	1157	1218	1218	731	232
242	Mar. 3, 1911	231	242	36	1157	1219	1219	735	232
243	Mar. 3, 1911	231	243	36	1157	1220	1220	737	232
244	Mar. 3, 1911	231	244	36	1157	Repealed	Repealed	738	233
245	Mar. 3, 1911	231	245	36	1158	1222	1222	738	233
246	Mar. 3, 1911	231	246	36	1158	1223	1223	745	233
247	Mar. 3, 1911	231	247	36	1158	1224	1224	746	234
248	Mar. 3, 1911	231	248	36	1158	Superseded	Superseded	747	234
249	Mar. 3, 1911	231	249	36	1158	1226	1226	750	235

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260	Mar. 3, 1911	231	260	36	1161	1237	1237	760	241
261	Mar. 3, 1911	231	261	36	1162	1238	1238	760	241
262	Mar. 3, 1911	231	262	36	1162	1239	1239	762	241
263	Mar. 3, 1911	231	263	36	1162	Repealed	Repealed	774	241
264	Mar. 3, 1911	231	264	36	1162	1241	1241	774	241
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266	Mar. 3, 1911	231	266	36	1162	1243	1243	778	242
267	Mar. 3, 1911	231	267	36	1163	1244	1244	792	243
268	Mar. 3, 1911	231	263	36	1163	1245	1245	803	243
269	Mar. 3, 1911	231	269	36	1163	1246	1246	816	243
270	Mar. 3, 1911	231	270	36	1163	1247	1247	818	243
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272	Mar. 3, 1911	231	272	36	1164	1249	1249	821	244
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284	Mar. 3, 1911	231	284	36	1165	1261	1261	838	247
285	Mar. 3, 1911	231	285	36	1166	1262	1262	840	247
286	Mar. 3, 1911	231	286	36	1166	1263	1263	841	247
287	Mar. 3, 1911	231	287	36	1166	1264	1264	842	248
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289	Mar. 3, 1911	231	289	36	1167	1266	1266	848	249
290	Mar. 3, 1911	231	290	36	1167	1267	1267	849	249
291	Mar. 3, 1911	231	291	36	1167	1268	1268	849	249
292	Mar. 3, 1911	231	292	36	1167	1269	1269	850	249
293	Mar. 3, 1911	231	293	36	1167	1270	1270	851	250
294	Mar. 3, 1911	231	294	36	1167	1271	1271	851	250
295	Mar. 3, 1911	231	295	36	1167	1272	1272	852	250
296	Mar. 3, 1911	231	296	36	1168	1273	1273	852	250
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EQUITY RULES

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES

Promulgated by the
Supreme Court of the United States
November 4, 1912

Rule 1. District court always open for certain purposes—Orders at chambers. The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Rule 2. Clerk's office always open, except, etc. The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

Rule 3. Books kept by clerk and entries therein. The clerk shall keep a book known as the "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

Rule 4. Notice of orders. Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

Rule 5. Motions grantable of course by clerk. All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso;* and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

Rule 6. Motion day. Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

Rule 7. Process, mesne and final. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall

be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 8. Enforcement of final decrees. Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit the plaintiff, filed with the clerk's office that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus,* to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

Rule 9. Writ of assistance. When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule 10. Decree for deficiency in foreclosures, etc. In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same,

as is provided in rule 8 when the decree is solely for the payment of money.

Rule 11. Process in behalf of and against persons not parties. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

Rule 12. Issue of subpoena—Time for answer. Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

Rule 13. Manner of serving subpoena. The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

Rule 14. Alias subpoena. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant.

Rule 15. Process, by whom served. The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Rule 16. Defendant to answer—Default—Decree pro confesso. It shall be the duty of the defendant, unless the time shall be

enlarged, for causes shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*

Rule 17. Decree pro confesso to be followed by final decree—Setting aside default. When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso,* and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Rule 18. Pleadings—Technical forms abrogated. Unless otherwise prescribed by statute or these rules the technical forms of pleading in equity are abolished.

Rule 19. Amendments generally. The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 20. Further and particular statement in pleading may be required. A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

Rule 21. Scandal and impertinence. The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initia-

tive, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

Rule 22. Action at law erroneously begun as suit in equity—Transfer. If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

Rule 23. Matters ordinarily determinable at law, when arising in suit in equity to be disposed of therein. If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

Rule 24. Signature of counsel. Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

Rule 25. Bill of complaint—Contents. Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in

alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

Rule 26. Joinder of causes of action. The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such cause of action cannot be conveniently disposed of together, the court may order separate trials.

Rule 27. Stockholder's bill. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

Rule 28. Amendment of bill as of course. The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

Rule 29. Defenses—How presented. Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency

of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

Rule 30. Answer—Contents—Counterclaim. The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

Rule 31. Reply—When required—When cause at issue. Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any

new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

Rule 32. Answer to amended bill. In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer.

Rule 33. Testing sufficiency of defense. Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

Rule 34. Supplemental pleading. Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

Rule 35. Bills of revivor and supplemental bills—Form. It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Rule 36. Officers before whom pleadings verified. Every pleading which is required to be sworn to by statute, or these

rules, may be verified before any justice or judge of any court of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public.

Rule 37. Parties generally—Intervention. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

Rule 38. Representatives of class. When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Rule 39. Absence of persons who would be proper parties. In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Rule 40. Nominal parties. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Rule 41. Suit to execute trusts of will—Heir as party. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Rule 42. Joint and several demands. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule 43. Defect of parties—Resisting objection. Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

Rule 44. Defect of parties—Tardy objection. If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to

whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

Rule 45. Death of party—Revivor. In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

Rule 46. Trial—Testimony usually taken in open court—Rulings on objections to evidence. In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

Rule 47. Depositions—To be taken in exceptional instances. The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting

depositions by either party within twenty days after the time for taking original depositions expires.

Rule 48. Testimony of expert witnesses in patent and trade-mark cases. In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

Rule 49. Evidence taken before examiners, etc. All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

Rule 50. Stenographer—Appointment—Fees. When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

Rule 51. Evidence taken before examiners, etc. Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to

sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

Rule 52. Attendance of witnesses before commissioner, master or examiner. Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master, or examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Rule 53. Notice of taking testimony before examiner, etc. Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

Rule 54. Deposition under Rev. Stat. §§ 863, 865, 866, 867—Cross-examination. After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite

party of the time and place of taking the depositions, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

Rule 55. Deposition deemed published when filed. Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

Rule 56. On expiration of time for depositions, case goes on trial calendar. After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

Rule 57. Continuances. After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

Rule 58. Discovery—Interrogatories—Inspection and production of documents—Admission of execution or genuineness. The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by

leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just excep-

tions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

Rule 59. Reference to master—Exceptional, not usual. Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Rule 60. Proceedings before master. Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte,* or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

Rule 61. Master's report—Documents identified but not set forth. In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge,

affidavit, deposition, examination, or answer were so brought in or used.

Rule 62. Powers of master. The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Rule 63. Form of accounts before master. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce,* or upon interrogatories, as the master shall direct.

Rule 64. Former deposition, etc., may be used before master. All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

Rule 65. Claimants before master examinable by him. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

Rule 66. Return of master's report—Exceptions—Hearing. The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered

by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

Rule 67. Costs on exceptions to master's report. In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

Rule 68. Appointment and compensation of masters. The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Rule 69. Petition for rehearing. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the circuit court of appeals or the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rule 70. Suits by or against incompetents. Guardians *ad litem* to defend a suit may be appointed by the court, or by

any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

Rule 71. Form of decree. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:" (Here insert the decree or order.)

Rule 72. Correction of clerical mistakes in orders and decrees. Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a hearing.

Rule 73. Preliminary injunctions and temporary restraining orders. No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification

of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

Rule 74. Injunction pending appeal. When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

Rule 75. Record on appeal—Reduction and preparation. In case of appeal:

(*a*) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *praecipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(*b*) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his *praecipe* under paragraph *a* of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the

time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purpose of the appeal.

(*c*) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph *b* of this rule and shall be covered by the directions which the court or judge may give on the subject.

Rule 76. Record on appeal—Reduction and preparation—Costs—Correction of omissions. In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

Rule 77. Record on appeal—Agreed statement. When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the district court, shall be treated as superseding, for the purpose of the appeal, all parts of the record other

than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

Rule 78. Affirmation in lieu of oath. Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Rule 79. Additional rules by district court. With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

Rule 80. Computation of time—Sundays and holidays. When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

Rule 81. These rules effective February 1, 1913—Old rules abrogated. These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the supreme court, regulating the practice in suits of equity, shall be abrogated when these rules take effect.

FORMS

[These forms are based almost entirely on the Equity Rules.]

1. PETITION

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs.
B Company, a corporation under the laws of Illinois,
Defendant.

Now comes the plaintiff, A, and for a cause of action herein says that he is a citizen and resident of Pomeroy, Ohio, in the Eastern Division of the Southern District of Ohio, and that defendant, B Company, is a corporation organized and existing under the laws of Illinois and a citizen and resident thereof, with its principal place of business in the city of Chicago, Illinois, and with a branch office under the control and management of a local manager, located at No. 430 Gwynne Building, Cincinnati, Ohio; that the matters involved herein amount to more than the sum of three thousand dollars, exclusive of interest and costs; that defendant holds itself out as in the investment and brokerage business, and engages in promoting various companies and selling the capital stock thereof; that on or about May 3, 1918, defendant sold to plaintiff two thousand and eighty shares of voting trust certificates of the common stock of the C Corporation, a corporation having its principal place of business in Sheboygan Falls, Wisconsin;

That the price at which defendant sold said stock to plaintiff was seven dollars ($7.00) per share, making a total purchase price of fourteen thousand five hundred and sixty dollars ($14,560.00); that plaintiff paid three thousand dollars ($3,000.00) cash on said purchase, and pledged with defendant as collateral for one hundred and twenty days twenty shares of preferred stock of the Grant Company and twenty shares of the common stock of the Grant Company;

That the sale of said stock was induced by certain false and fraudulent representations made to plaintiff; that defendant, through its agent, represented to plaintiff that defendant corporation was a five million dollar corporation, that it had made money for all its clients and customers who purchased from it stock of the C Corporation and other companies which defendant had financed and for whom it had sold stock;

That it was further represented to plaintiff by defendant's agent that the C Corporation stock was a wonderful bargain at seven dollars per share;

that the stock was worth a great deal more than seven dollars per share; that the C Corporation had an eight million dollar contract with the Government; that the stock of the C Corporation would be listed by defendant on the New York Curb positively on June 15, 1918, and that defendant thereupon warranted to the plaintiff that the listing of said stock on the New York Curb would be on or before June 15, 1918; that plaintiff, in reliance upon said statements and believing them to be true, purchased said two thousand and eighty shares of stock of the C Corporation.

That said representations, whereby plaintiff was induced to buy said stock, were false and fraudulent in this, to wit; that said stock was not worth seven dollars per share, but was only worth $3.50 to $4.00 per share, and that said stock, unknown to plaintiff, had at that time a market value of only that amount;

That defendant corporation was not a five million dollar corporation, but capitalized at a very much smaller sum of money, and said representation was made to obtain the confidence of plaintiff; that defendant had not made money for all of its clients and customers who had purchased from it either stock of the C Corporation or the stock of other companies, but that the persons who had purchased said stock of the C Corporation at the sum of seven or eight dollars per share were not able to dispose of said stock for the price they had paid for it, and lost money wherever they sold said stock; that the C Corporation did not have an eight million dollar contract with the Government, and said representation was false and made for the purpose of inducing proposed customers to believe that the profits of the C Corporation were greater than they actually were; that said stock of the C Corporation was not listed on the New York Curb, and defendant knew that it would not be listed on the Curb, but said representation was made for the purpose of inducing plaintiff and others to whom said statement was made to believe that the stock so purchased could be sold easily and at an advance upon the price to be paid for said stock; that defendant, through its agents, had made said representations not only to this plaintiff, but to many others, before and at the time of the transaction herein set out, and said statement was false and known to be false, both on former occasions and at the time it was made to this plaintiff;

That on or about June 12, 1918, defendant sold to plaintiff a second block of C Corporation stock, consisting of three thousand additional shares of C Corporation common stock, for which he was to pay eight dollars per share, making a total purchase price of twenty-four thousand dollars ($24,000.00); that no cash was given to defendant in this transaction;

That defendant, through its agent, induced plaintiff to make said purchase of stock by the repetition of the same false and fraudulent representations above set out, at the time of the sale of two thousand and eighty shares of voting trust certificates of the common stock of said corporation, and in addition to said false statements above set out defendant warranted to this plaintiff that the stock of C Corporation would be listed on the New York Curb positively on June 27, 1918;

That plaintiff relied upon said false statements, which were unknown to him to be false, and was induced thereby to make said second purchase of stock;

That at the time of the second purchase of stock, plaintiff did not give

defendant or its agents any cash, but turned over to defendant two hundred shares of Ohio Cities Gas Company stock, to be used as collateral for a loan which was to represent the purchase price of said three thousand shares of stock, said loan to extend for a period of not to exceed ninety days;

That plaintiff hereby offers to defendant the stock of the C Corporation, so purchased by him, and demands the return by defendant to plaintiff of the money paid and securities heretofore pledged to defendant in the first and second transactions set out above;

That there is danger that plaintiff will dispose of the stocks above described, either by sale, pledge or otherwise, and that if this is done, defendant may not be able to respond in damages should this suit be decided in favor of plaintiff.

Wherefore plaintiff prays for a rescission of the contracts of sale above set out and described, and that the defendant be ordered to return to plaintiff the sum of three thousand dollars ($3,000.00) that plaintiff paid to defendant, and the securities above set out, and in addition plaintiff asks for the cancellation of the obligation of the balance of the purchase price of said shares of the C Corporation; that plaintiff be granted an injunction restraining defendant from in any way disposing of the stocks described in this petition, by way of pledge, sale or otherwise, until this suit has been decided by the Court, and for such further and other relief as the nature and the circumstances of this case may require and to the Court may seem just.

To the end that plaintiff may obtain the relief to which he is justly entitled in the premises, he now prays the Court to grant him new process by subpoena directed to the said B Company, defendant herein, requiring it to answer, but not under oath, the same being expressly waived, all allegations in this petition.

D,
E,
F,
Attorneys for Plaintiff.

The United States of America,
Southern District of Ohio,
Hamilton County. } ss.

On this.....day of.....19.., personally appeared A, the above-named plaintiff, who made solemn oath that he had read the foregoing petition subscribed by him, and knows the contents thereof, and the same is true of his knowledge, except as to matters therein related on information and belief, and as to these matters he believes it to be true.

A.

Sworn to before me and subscribed in my presence this.....day of .....19...

N. P.,
Notary Public in and for Hamilton County, Ohio.

2. PRAECIPE FOR SUBPOENA.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs. No.....
B Company,
Defendant.

To B. E. Dilley, Clerk of said Court:
Please issue Subpoena in Chancery.....
.....
.....
.....
.....

D,
E,
F,
Attorneys for Plaintiff.

3. SUBPOENA IN CHANCERY.

The United States of America,
Southern District of Ohio, ss.
Western Division.

The President of the United States of America.
To the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to subpoena B Company, a corporation under the laws of Illinois,.....
.....
citizen of and resident in the State of Illinois, if it be found in your District to be and appear in the District Court of the United States for the Western Division of the Southern District of Ohio, aforesaid, at Cincinnati, to answer a certain Bill in Chancery, filed and exhibited in said Court, against it by A,
.....
citizen of and resident in the State of Ohio.....
Hereof you are not to fail under the penalty of the law thence ensuing.

You will make due return of this writ on or before the 31st day of October, A. D. 1918.

Witness the Honorable Howard C. Hollister, Judge of the District Court of the United States, this 11th day of October, A. D. 1918, and in the 143rd year of the Independence of the United States of America.

Attest: B. E. DILLEY, Clerk.
By F. V. LAMB, Deputy.

MEMORANDUM.

The said defendant is required to file its answer or other defense in this suit in the Clerk's Office of said Court on or before the twentieth day after service of this subpoena, excluding the day thereof, otherwise the said bill may be taken pro confesso.

B. E. DILLEY, Clerk.
By F. V. LAMB, Deputy.

4. MOTION FOR A TEMPORARY RESTRAINING ORDER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs. } Motion.
B Company,
Defendant.

Now comes the plaintiff and moves the Court for a temporary restraining order, in accordance with the prayer of the petition herein.

D,
E,
F,
Attorneys for Plaintiff.

5. NOTICE OF APPLICATION FOR RESTRAINING ORDER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.
No. 160.

A,
vs.
B Company, a corporation,

You are hereby notified that plaintiff herein will apply for a temporary restraining order in the above cause, before Hon. Howard C. Hollister, Judge of the United States District Court, Cincinnati, Ohio, Government Building, at 2:30 P. M., Friday, October 11, 1918.

A.
By D,
E,
F,
His Attorneys.

6. ENTRY GRANTING RESTRAINING ORDER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 160.

A,
Plaintiff,
vs.
B Company, a corporation, under the laws of Illinois.
Defendant.
} Entry.

This cause came on to be heard on the motion of plaintiff for a temporary restraining order and upon notice thereof to defendant, and a hearing in Court, the Court doth find that said motion should be granted, and it is therefore ordered that defendant and its agents be and they are hereby temporarily restrained from in any way disposing by sale, pledge or otherwise of the stocks held by defendant as collateral and described in the petition herein, and that defendant and its agents are bound by this order until the hearing of this cause by the Court, or the further order of the Court.

HOLLISTER, Judge.

7. PRAECIPE FOR CERTIFIED COPY OF TEMPORARY RESTRAINING ORDER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
vs.
B Company,
} No. 160.

To B. E. Dilley, Clerk of said Court:

Please issue certified copy of temporary restraining order granted herein on October 11, 1918.

D,
E,
F,
Attorneys for Plaintiff.

8. ENTRY GRANTING FURTHER TIME IN WHICH TO ANSWER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 160.

A,
Plaintiff,
vs.
B Company, a corporation under the laws of Illinois,
Defendant.
Entry.

On application of the defendant and with consent of the plaintiff and for good cause shown, the Court does now grant the defendant thirty days further time in which to plead.

HOLLISTER, Judge.

9. ANSWER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 160.

A,
Plaintiff,
vs.
B Company,
Defendant.
Answer of B Company to the Petition of A.

ANSWER.

And now comes the defendant B Company, sued herein as B Company a corporation organized and existing under the laws of the State of Illinois, and for answer to the petition of A, or to such part thereof that this defendant is advised it is material or necessary for it to answer, shows that it is not a corporation organized and existing under the laws of the State of Illinois as alleged in the plaintiff's said petition, but that this defendant is a common law trust or organization existing by virtue of articles of association or agreement bearing date the 27th day of December, A. D. 1917; that its affairs and the several transactions named in plaintiff's petition were carried on and negotiated by this defendant and petitioner as a common law trust; that R, S, and T are the trustees of this defendant; that this defendant took over the capital stock and business of C Company an Illinois corporation, D Company a New York corporation, E Company a Delaware corporation and F Company a California corporation on or about the 1st day of January, A. D. 1918; that the name of C Company an Illinois corporation was after-

wards, on the 10th day of April, A. D. 1918, changed to C Investment Corporation, and that none of the several transactions and negotiations mentioned in plaintiff's petition were carried on by the C Investment Corporation.

Further answering, this defendant admits that it is a citizen and resident of the State of Illinois, with its place of business in the City of Chicago, Illinois, and that it maintains a branch office in the City of Cincinnati, State of Ohio; that the matters involved herein amount to more than the sum of three thousand ($3,000.00) dollars exclusive of interest and costs; that this defendant holds itself out as in the investment and brokerage business, but this defendant denies that it engages in promoting various companies and selling the capital stock thereof, but shows unto the court that this defendant has heretofore, and did purchase all of the stock of the C Corporation, and has from time to time sold its holdings of capital stock in said corporation by offerings thereof to the public generally; and admits that on or about May 3rd, 1918, defendant sold to plaintiff 2,080 shares of voting trust certificates of the common stock of the C Corporation at a price of seven ($7.00) dollars per share, making a total purchase price of fourteen thousand five hundred and sixty ($14,560.00) dollars; that plaintiff paid three thousand ($3,000.00) dollars cash on said purchase and pledged with defendant as collateral to secure the balance of said purchase price of said stock for one hundred and twenty days 20 shares of preferred stock of the Grant Company, and 20 shares of the common stock of the Grant Company, as will more fully appear by the confirmation agreement, ready to be produced in court, a copy of which is hereto attached marked A, and made a part hereof.

Further answering, this defendant denies that the sale of said stock was induced by certain false and fraudulent representations made to plaintiff, and denies that this defendant through its agent represented to plaintiff that defendant corporation was a five million ($5,000,000.00) dollar corporation, that it had made money for all its clients and customers who purchased from it stock of the C Corporation and other companies which defendant had financed, and for whom it had sold stock.

And this defendant further answering, admits that it was represented to plaintiff by defendant's agent that the C Corporation stock was a wonderful bargain at seven ($7.00) dollars per share, and that the stock was worth a great deal more than $7.00 per share, but denies that this defendant at any time represented that the C Corporation had an eight million ($8,000,000.00) dollar contract with the Government, and that the stock of the C Corporation would be listed by this defendant on the New York Curb positively on June 15, 1918, and that this defendant thereupon warranted to the plaintiff that the listing of said stock on the New York Curb would be on or before June 15, 1918; and this defendant denies that the plaintiff in reliance upon said statements alleged to have been made or either of them, and supposing them to be true purchased said 2,080 shares of stock of the C Corporation, and on the contrary shows that the plaintiff purchased the said stock in accordance only with the terms and conditions mentioned, and shown in the confirmation agreement hereinabove referred to and made a part of this bill by reference as Exhibit A.

Further answering this defendant denies that said stock was not worth $7.00 per share, and that it was worth only $3.50 to $4.00 per share, and that

said stock unknown to plaintiff had at that time a market value of only that amount.

Further answering this defendant states that more than five million ($5,000,000.00) dollars is employed in its said business, and denies that any representation was made that the defendant was a $5,000,000.00 corporation for the purpose of wrongfully obtaining the confidence of plaintiff; and this defendant denies that persons who had purchased stock of the C Corporation at the sum of $7.00 or $8.00 per share ever lost money on account of their purchases through any act or omission chargeable to this defendant; and further shows that no person who has followed the advice and recommendations of this defendant in reference to their holdings of stock in said corporation purchased from this defendant has lost money on account of their said holdings.

And further answering this defendant shows that the C Corporation did have contracts for war work, the approximate total of which is in the neighborhood of seven million ($7,000,000.00) dollars, and denies that this defendant made any false misrepresentations in reference to Government contracts for the purpose of inducing the plaintiff or other customers to believe that the profits of the C Corporation were greater than they actually were, and this defendant denies that the plaintiff herein was or has been in any way injured by reason of the fact that any statements were made to the plaintiff by this defendant.

And for further answer this defendant shows that it is not informed save by the complainant's bill of complaint that the C Corporation was not listed on the New York Curb, and therefore neither admits nor denies the same, but calls for strict proof thereof. This defendant denies that it knew that the C Corporation would not be listed on the Curb, and denies that it made any representation that the C Corporation would be listed on the Curb for the purpose of inducing plaintiff and others to believe that the stock could be sold easily and at an advance upon the price to be paid for the stock, and this defendant denies that it made any false representation to the plaintiff or to others before and at the time of the transaction set out in plaintiff's petition, and denies that any such statement was false and known to be false both on former occasions and at the time it was made to this plaintiff.

This defendant admits that on or about June 12, 1918 this defendant sold to plaintiff a second block of stock of the said C Corporation consisting of 3,000 shares of the C Corporation common stock for which he agreed to pay eight ($8.00) dollars per share, making a total purchase price of twenty-four thousand ($24,000.00) dollars; that no cash was paid to defendant on this transaction, and this defendant denies that it through its agents induced plaintiff to make said last purchase by reason of any false and fraudulent representations as alleged in the petition.

This defendant denies that it warranted to the plaintiff that the stock of the C Corporation would be listed on the New York Curb positively on June 27, 1918.

And this defendant denies that the plaintiff relied upon any of the statements alleged in the petition in reference to this last mentioned purchase, and denies that any statements were made by this defendant which were false, and that he was induced to make said second purchase of stock on account of representations of any kind made by this plaintiff, but on the

contrary shows that the said purchase last mentioned was made solely in accordance with the terms and agreements as appears by the written confirmation agreement thereof signed by the plaintiff ready to be produced in court, a copy of which is hereto attached marked Exhibit B, and made a part hereof.

This defendant further admits that to secure payment of the purchase price of said second purchase of stock, the plaintiff pledged with the defendant as collateral for a period of ninety days 200 shares of Ohio Cities Gas Company stock, and this defendant says that the plaintiff has not as yet paid the purchase price agreed upon for said purchase, and denies that the plaintiff is entitled to the return of the securities mentioned in the petition heretofore pledged to this defendant in the said second transaction as collateral, and this defendant denies that there is danger that it will dispose of the stocks held by it as collateral, and denies that this defendant is not able to respond in damages should this suit be decided in favor of the plaintiff, and this defendant denies that the plaintiff is entitled to a rescission of contracts of sale which govern the transactions in question, and denies that the plaintiff is entitled to have the obligation to pay the purchase price for said purchase of C Corporation common stock cancelled, and that it is entitled to an injunction restraining this defendant from disposing of the stock described in the petition, and denies that the plaintiff is entitled to the relief or any part thereof as prayed in his petition.

COUNTER-CLAIMS.

1. By way of counter-claim against the said plaintiff the defendant says that on or about the 3rd day of May, 1918, defendant sold to the plaintiff 2,080 shares of the C Corporation common stock voting trust certificates for which plaintiff agreed to pay to defendant seven ($7.00) dollars per share, making a total purchase price of fourteen thousand five hundred and sixty ($14,560.00) dollars; that the plaintiff paid on said transaction to the defendant the sum of three thousand ($3,000) dollars and to secure the payment of the balance of said purchase price, plaintiff pledged with defendant 20 shares of the preferred stock of the Grant Company and 20 shares of the common stock of the Grant Company; that said collateral was pledged on said balance of the purchase price of said stock for the period of 120 days according to a certain confirmation agreement then and there entered into between the defendant and plaintiff, a copy of which is hereto attached marked A;

That there is due to the defendant from the plaintiff on said purchase price the sum of eleven thousand five hundred and sixty ($11,560.00) dollars, no part of which has been paid by the said plaintiff to the said defendant; that the defendant has demanded of the plaintiff that he pay the said sum of eleven thousand five hundred and sixty ($11,560.00) dollars upon said contract, but the said plaintiff refused and still refuses to pay said sum or any part thereof.

2. By way of counter-claim against the plaintiff the defendant says that on or about June 12, 1918, it sold to the plaintiff 3,000 shares of stock of the C Corporation at a price of $8.00 per share aggregating twenty-four thousand ($24,000) dollars; that no part of said purchase price was paid to the defendant at the time of the transaction; that at the time of the said second purchase of stock plaintiff to secure the payment therefor pledged

with the defendant for the period of ninety days 200 shares of Ohio Cities Gas Company stock, which said sale and pledge were made according to a certain confirmation agreement then and there entered into between the defendant and plaintiff, a copy of which is hereto attached marked Exhibit B;

That the plaintiff has not paid the defendant the said sum of twenty-four thousand ($24,000.00) dollars or any part thereof for the purchase price of said stock; that the said sum of twenty-four thousand ($24,000.00) dollars is now due to the defendant from the plaintiff upon said purchase; that the defendant has demanded of the plaintiff that he pay the said sum of twenty-four thousand ($24,000.00) dollars on said contract, but the plaintiff has refused and still refuses to pay said sum or any part thereof.

Wherefore plaintiff prays judgment against the defendant in the sum of thirty-five thousand five hundred and sixty ($35,560.00) dollars with interest on eleven thousand five hundred and sixty ($11,560.00) dollars from May 3, 1918, and on twenty-four thousand ($24,000) dollars from June 12, 1918; defendant further prays that the temporary injunction heretofore granted be vacated, and that an account may be taken of the stocks of the C Corporation so sold to the plaintiff and set forth in its said counter-claims, and of the collateral pledged to secure the said sales as set forth therein, and that all of the same may be ordered to be sold and the proceeds applied to the payment of the indebtedness of plaintiff to the defendant; and that execution be awarded against the defendant for any balance or deficiency that might occur after said sale, and for all other and proper relief.

G and H,
Attorneys for B Company.

State of Illinois,
County of Cook. } ss.

T, being first duly sworn, says that he is the treasurer and agent of B Company, defendant herein, and that the facts stated and allegations contained in the foregoing counter-claims are true as he verily believes.

T.

Sworn to before me and subscribed in my presence this 25th day of November, 1918.

N. P.,
Notary Public, Cook County, Illinois.

10. REPLY.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, *Plaintiff*,
vs.
B Company, *Defendant*.

No. 160.
Reply and Answer.

Now comes plaintiff herein and for reply to the answer of defendant, denies each and every allegation therein contained not admitted in the petition.

Wherefore plaintiff prays as in said petition.

ANSWER TO COUNTER-CLAIMS.

Now comes plaintiff and for answer to the counter-claims of defendant admits that plaintiff entered into the contracts for the purchase of stocks set out in said counter-claims, and that plaintiff deposited with defendant as collateral the moneys, stocks and bonds set out in said counter-claims.

Further answering, plaintiff reiterates the matters and facts set out in the petition herein, and in addition thereto alleges;

That defendant was engaged in a general scheme to defraud this plaintiff and many others unknown to plaintiff, in maintaining throughout the United States a large number of branch offices, approximately to the number of twenty-one, and that all of said offices were selling the common and preferred stock of C Corporation and also voting trust certificates of the common stock of said corporation, on the general plan of sale outlined in the transactions described in the petition herein, to wit: that said sale of stock and voting trust certificates was conducted by telephone and telegram, and false representations were made to the various persons sought to be defrauded as to the value of said stocks;

That it was represented to said various people that the common stock and voting certificates were worth seven or eight dollars per share; that said stock would be listed on the New York Curb within a definite time thereafter; that the financial condition of said C Corporation was in an excellent condition; that defendant had a capital of five million dollars; that said C Corporation had Government contracts to the extent of eight million dollars.

That said representations were false and fraudulent in this, to wit: that said C Corporation was from April 1917 to October 1918, on account of financial difficulties, in the hands of a creditors' committee; that said stock and voting trust certificates were not worth seven or eight dollars per share, but had little, if any, value; that defendant did not have any capital stock whatever, but had a working capital, as a common law trust, very much less than five million dollars; that said C Corporation had no Government contracts whatever, but had contracts to do work on material that was to be used in Government contracts, in an amount very much less than eight million dollars; that the stock of C Corporation was not intended to be listed on the New York Curb, and that that statement was made for the purpose of obtaining the confidence of victims of the fraud in order to make them believe that said stock could be sold readily at a high price;

That it was part of the fraudulent scheme of defendant to make contracts for the sale of larger amounts of stock than were in existence, in the expectation that the victims of the fraud, upon learning of the real value of C Corporation stock, would repudiate their contracts, and defendant would then appropriate the collateral put up by said victims, and in that way defendant would realize fraudulently large profits on said operation of its scheme.

Wherefore plaintiff prays as in his original petition, that the court rescind the contracts entered into by plaintiff to purchase stock, and that the collateral deposited with plaintiff, whether stocks, bonds or moneys, be

returned to plaintiff, and for such other and further relief as is proper in the premises.

D,
E,
F,
Attorneys for Plaintiff.

United States of America,
Southern District of Ohio, } ss.
Meigs County,

On this 7th day of January, 1919, personally appeared A, the above-named plaintiff, who made solemn oath that he had read the foregoing reply and answer to counter-claims of defendant, subscribed by him, and knows the contents thereof, and the same are true to his knowledge, except as to matters therein related on information and belief, and as to these matters he believes it to be true.

A.

Sworn to before me and subscribed in my presence this 7th day of January, 1919.

N. P.,
Notary Public in and for
Meigs County, Ohio.

11. ENTRY SUGGESTING DEATH OF PLAINTIFF, AND ALLOWING REVIVOR.

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 160.

A, *Plaintiff*,
vs.
B Company, *Defendant*.

Entry Suggesting Death of Plaintiff and Making E, Executor, Party Plaintiff and Revivor.

Now comes E and suggests to the Court the death of A, the plantiff herein, and that he is the duly appointed and qualified executor of the said A, and moves the Court for leave to become a party of this action and to continue the same; and the Court, finding the suggestion to be true, grants said motion; and said E, Executor, is accordingly made party plaintiff in this action, and the action proceeds.

HOLLISTER, Judge.

12. ENTRY DISMISSING PETITION AND COUNTER-CLAIM.

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 160.

A,
Plaintiff.
vs.
B Company,
Defendant.
} Entry.

It being represented to the Court that all matters of controversy herein between plaintiff and defendant have been settled; on motion of both plaintiff and defendant the petition and counter-claim are both dismissed at the costs of the plaintiff, and by consent of both parties record is hereby waived.

HOLLISTER, Judge.

13. AFFIDAVIT USED WHEN ASKING FOR A RESTRAINING ORDER WITHOUT FIRST GIVING NOTICE TO THE OPPOSITE PARTY.

State of Ohio,
County of Hamilton. } ss.

A, being first duly sworn, makes oath and says

That he is Special Agent of the B Company, plaintiff herein; that said B Company is a corporation under the laws of the State of Ohio; that he has read the foregoing Bill of Complaint and is familiar with the contents thereof; and that the facts therein stated are within his personal knowledge, except so far as the same are set out on information and belief, and that so far as the same are within his personal knowledge the same are true, and that so far as the same are therein set forth on information and belief he believes the same to be true as the result of diligent and faithful inquiry into the truth thereof;

And affiant further says that to give notice for an application for injunction herein would tend to defeat the object of such application, by enabling the said defendant C to place her property beyond the reach of her creditors and particularly of the plaintiff before such application could be heard.

A.

Sworn to before me and subscribed in my presence, this 13th day of February, 1920.

N. P.,
Notary Public, Hamilton County, Ohio.

14. MOTION FOR PRELIMINARY INJUNCTION, AND FOR AN ORDER TO SHOW CAUSE.

IN THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff.
vs. } In Equity.
B,
Defendant.

MOTION FOR PRELIMINARY INJUNCTION AND FOR AN ORDER TO SHOW CAUSE.

Now comes the plaintiff in the above entitled cause, by C, its solicitor, and moves this Honorable Court to grant a writ of injunction against said defendants, their agents, attorneys, clerks, servants, workmen, and employees during the pendency of this suit and until the further order of this Court, conformable to the prayer of the bill in said cause filed herewith, and in support of this motion plaintiff files herewith a certified copy of the decree and injunction filed in the United States Circuit Court for the Northern District of West Virginia in the case of D & Son v. E & F, et al., certified copies of the decree and injunction filed in the United States Circuit Court for the Northern District of West Virginia in the case of A v. G Company certified copy of the mandate from the Court of Appeals of the Fourth Judicial Circuit in the case of G Company, appellant v. A, appellee, certified copy of the decree and injunction filed in the United States District Court for the Eastern District of Missouri in the case of A v. H Company, certified copies of the decree and injunction in the case of A v. I, filed in the United States District Court for the Northern District of West Virginia, and the affidavits of J, K, L, M and N, together with the exhibits referred to therein.

Plaintiff also asks that a rule be entered, directed to the said defendants B, to show cause, if any they have, why the preliminary injunction should not be granted in accordance with this motion and the prayer of the bill.

C,
Solicitor & Counsel for Plaintiff.

Dayton, Ohio, June 12th, 1913.

15. RULE TO SHOW CAUSE.

IN THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff.
vs. } In Equity.
B,
Defendant.

RULE TO SHOW CAUSE.

The Plaintiff, having filed a motion for preliminary injunction and an order to show cause why the same should not be granted and affidavits and

other documents in support thereof, and after due consideration had, it is ordered that the defendants in this cause, B Company, be and appear in the Court Room of this Court at Cincinnati, Ohio, at ten o'clock in the forenoon on the 5th day of July, 1913, then and there to show cause, if any they may have, why a preliminary injunction should not issue in accordance with the prayer of the bill of complaint.

It is further ordered that a copy of this order, together with the motion for preliminary injunction and a copy of the affidavits and documents filed in support thereof be immediately served upon the defendants, B Company, at .....; that defendants file herein and serve on plaintiff's solicitor, C at his offices, ..., Dayton, Ohio, on or before the 23rd day of June, 1913, all affidavits or other writings to be used in their behalf on the return of this order, and that plaintiff file herein, on or before the 1st day of July, 1913, all affidavits or other writings to be used in reply, copies of which shall be served on defendants' solicitor.

Dated at Cincinnati, Ohio, this 13th day of June, 1913.

Signed: HOLLISTER,
United States District Judge.

16. ORDER FOR PRELIMINARY INJUNCTION.

IN THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 7.

A Company, *Plaintiff.*
vs.
B Company, *Defendant.*
In Equity.

ORDER FOR PRELIMINARY INJUNCTION.

This cause came on to be heard before this court on the second day of August, 1913, on plaintiff's motion for a preliminary injunction, and after having heard and considered argument of counsel for both parties and having examined and considered the affidavits and exhibits of the parties filed in this cause, the court finds that defendants have infringed and are infringing on the patent of plaintiff as alleged in the Bill of Complaint, and the said motion for a preliminary injunction is hereby granted.

It is, therefore, ordered that the defendants herein, B Company, and each and every one of them, and their associates, attorneys, clerks, agents, workmen and representatives, and each of them, during the pendency of the action and until the further order of this Court, be and they are hereby restrained, forbidden and enjoined from directly or indirectly in any manner making, using, selling or otherwise disposing of and from offering, or causing or procuring others to make, use, sell or otherwise dispose of in any manner, any water motors or apparatus containing the invention and improvements described and claimed in United States Reissue letters patent No. 12,719, dated November 12, 1907, issued to C & Son, assigned and transferred to

A Company, the plaintiff herein, described in the Bill of Complaint herein, and from directly or indirectly making, using, selling or otherwise disposing of and from offering or attempting to make, use, sell or otherwise dispose of, in any manner, defendants' motors filed in this case and marked Complainant's Exhibit, Infringing Motor or any motor substantially like it, and from in any manner directly or indirectly infringing upon or violating said letters patent No. 12,719, or inducing, procuring or assisting others to infringe upon or violate said letters patent.

It is further ordered that plaintiff shall file a bond in the sum of Five Thousand Dollars ($5,000.) conditioned to abide the decision of this court and appellate court, and to pay all moneys and costs which shall be adjudged against it in case this injunction may be dissolved, said bond to be filed forthwith and approved by the Clerk of this Court.

Dated at Cincinnati, Ohio, on this 5th day of August, 1913.

HOLLISTER, Judge.

17. DECREE.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 7.

A Company,
vs. } In Equity.
B Company,

ENTRY.

This cause coming on to be further heard and it appearing to the Court that the parties have amicably adjusted and settled their controversy, and the said parties consenting, it is ordered, adjudged and decreed as follows:

(1). That complainant's patent referred to in the bill of complaint and its title thereto are as against the defendants good and valid as averred in the said bill of complaint.

(2). That the motors made and sold by the defendants like that marked Complainant's Exhibit, Infringing Motor are as against the defendants an infringement of said patent as averred in said bill of complaint.

(3). That the bill of complaint is hereby sustained but in view of the amicable settlement and the license agreement entered into between the parties the preliminary injunction heretofore granted is hereby dissolved, the court costs to be paid equally by complainant and defendants, and the defendants and those to whom they sold said motors, to be relieved from the payment of royalties, damages or other compensation that might be due to their acts of infringement of the patent as set forth in said bill of complaint.

HOLLISTER, Judge.

18. WRIT OF INJUNCTION.

The United States of America,
Southern District of Ohio, } ss.
Western Division.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To B and B Company, Greeting:

Whereas A Company, citizen of the State of Ohio, has filed on the Chancery side of the District Court of the United States for the Western Division of the Southern District of Ohio, a bill against B and B Company, and has obtained an allowance for a preliminary injunction, as prayed for in said Bill, from the Honorable Howard C. Hollister, District Judge,

NOW, THEREFORE, we, having regard to the matters in said Bill contained, do hereby command and strictly enjoin you, the said B and B Company and each and every of you, and your associates, attorneys, clerks, agents, workmen and representatives, and each of them, during the pendency of this action and until the further order of this Court, from directly or indirectly in any manner making, using, selling or otherwise disposing of and from offering, or causing or procuring others to make, use, sell or otherwise dispose of in any manner, any water motors or apparatus containing the invention and improvements described and claimed in United States Reissue letters patent No. 12,719, dated November 12th, 1907, issued to D & Son, assigned and transferred to A Company, described in the Bill of Complaint herein, and from directly or indirectly making, using, selling or otherwise disposing of, in any manner, defendants' motors filed in this case and marked Complainant's Exhibit, Infringing Motor, or any motor substantially like it, and from in any manner directly or indirectly infringing upon or violating said letters patent No. 12,719, or inducing, procuring or assisting others to infringe upon or violate said letters patent. Which commands and injunction you are respectively required to observe and obey, until our said District Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable Howard C. Hollister, District Judge of the United States, this 5th day of August A. D. 1913, and in the 138th year of the Independence of the United States of America.

B. E. DILLEY, Clerk,
U. S. Dist. Court, Southern District of Ohio.

By F. V. LAMB, Deputy.

19. WAIVER OF SUMMONS, AND ENTRY OF APPEARANCE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.
In Equity.

No. 6749.

A, Receiver of B Company, *Plaintiff.*
vs.
C Company, et al., *Defendants.*

Waiver of Summons and Entry of Appearance of D.

Now comes D, of Springfield, Ohio, one of the defendants herein, and waives the issuance and service of summons and voluntarily enters his appearance herein.

D.

20. APPEARANCE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company,
vs.
B and C.

No. 189.

To the Clerk of said Court:

Please enter my appearance as Solicitor and of Counsel on behalf of defendants, B and C.

D,
E,
Solicitors for B and C, defendants.

21. PETITION FOR SUBSTITUTION OF PLAINTIFF AND FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 173.

A Company, *Plaintiff.*
vs.
B Company, *Defendant.*

In Equity.

PETITION FOR SUBSTITUTION OF PLAINTIFF AND FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT.

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, sitting at Cincinnati, GREETING:

And now comes the C Company, a corporation duly organized and existing under the laws of the State of Illinois, a citizen and inhabitant of the State of Illinois and having its office and principal place of business in the City of Chicago, County of Cook and State of Illinois, and shows to the court that by an instrument in writing (a copy of which is hereunto attached, and your petitioner stands ready to present the original on demand) dated December 29, 1919, your petitioner the C Company, acquired title from the A Company, to the letters patent No. 841,211 here sued upon (including the right to sue for past infringements) and that your said petitioner is now the exclusive owner of said letters patent including the right to sue for past infringements.

Wherefore, your petitioner begs leave of court to be substituted in lieu of the A Company, as plaintiff in this case and asks leave to file the hereunto attached Amended Bill of Complaint.

C Company,
By D.
Their Attorney.

March 5th, 1920.

22. STIPULATION FOR SUBSTITUTION OF PLAINTIFF AND AMENDING BILL OF COMPLAINT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 173.

A Company, *Plaintiff.*
vs.
B Company, *Defendant.*
In Equity.

STIPULATION.

It is stipulated by and between the plaintiff and defendant, the court consenting thereto, that the hereunto attached motion on behalf of the C Company for leave to be substituted for the plaintiff, A Company, and for leave to file the amended bill of complaint also attached hereto, be granted forthwith, and that the herewith presented Final Decree be entered in this cause.

C Company,
By D.
Their attorney.
B Company,
By E and F.
Their attorneys.

March 5th, 1920.

23. PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM.

THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF OHIO,
Western Division.
In Equity.

No. 76.

A and B,
Plaintiffs.
vs.
C et al.,
Defendants.

Petition for Appointment of a Guardian Ad Litem on the Petition of the Plaintiffs.

To the Honorable The Judges of the District Court of the United States of the Southern District and Western Division:

Now Comes D and represents to the Court that the said C, defendant in the Bill filed herein by A and B against C et al., to foreclose a mortgage alleged to have been executed by said C and praying for the sale of the mortgaged premises, is a drunkard and under guardianship.

He further represents that the said C was, on or about the 26th day of August, 1914, by the Court of Common Pleas of Butler County, Ohio, on an appeal from the Probate Court of said Butler County, duly adjudged a drunkard by said Common Pleas Court and incapable of managing, controlling and taking care of his said property and on said date the said D, this petitioner, was duly appointed and qualified as the guardian of the person and the estate of the said C and is now acting as such. That by reason of said guardianship the said C is incapable of defending in this action.

That on the 13th day of September, 1915, process in this suit was duly served on said C requiring him to appear and answer the said Bill, returnable according to law. That no guardian ad litem has yet been appointed of such defendant or applied for by him or by any person on his behalf to the knowledge of your petitioner.

Your petitioner therefore prays that D, the legal guardian of the said C, may be appointed guardian ad litem of such defendant to appear and defend this suit on his behalf.

D,
By E,
F.
Solicitors.

24. ORDER GRANTING APPOINTMENT OF GUARDIAN AD LITEM.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A and B, *Plaintiffs*,
vs.
C et al., *Defendants*.

In Equity No. 76.
Entry.

This day this cause came on to be heard upon the petition of D for the appointment of a guardian ad litem for the defendant, C, herein, and the Court, being fully advised in the premises, does find that the allegations of said application are true and that a guardian ad litem should be appointed for the defendant, C.

It is therefore considered and adjudged by the Court that D be and hereby is appointed guardian ad litem for the said C, defendant herein.

HOLLISTER, Judge.

25. NOTICE OF MOTION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company, *Plaintiff*,
vs.
B Company and C, *Defendants*.

No. 59.
Notice of Motion.

D, Esq.

Sir: Please take notice that on the 1st day of April, 1915, at the call of the motion for a preliminary injunction in this cause we shall present the motion to dismiss the Bill of Complaint, a copy of which is attached hereto, and shall ask for an immediate hearing thereof.

Respectfully,
E.
F.

Copy of foregoing notice and of motion to dismiss acknowledged this 25th day of March, 1915.

D,
Attorney for Plaintiff.

26. MOTION TO DISMISS BILL OF COMPLAINT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company,
Plaintiff,
vs.
B Company and C,
Defendants.

No. 59.
A Special Appearance on Behalf of C and Motion to Dismiss the Bill of Complaint as to the Party C.

And now comes C by his attorneys, E and F, appearing specially for the purpose of this motion and for no other purpose, and moves this Honorable Court that the Bill of Complaint, in so far as the said C is concerned, shall be dismissed and for cause therefor showeth:

(1) No service has been made or had in this cause upon the said C.

(2) The complaint shows that the said C is not an inhabitant of this district, nor has a regular and established place of business in this district and has committed infringing acts in this district.

Wherefore this Court has no jurisdiction of the pretended cause of action herein stated against the said C.

The complaint, therefore, should be dismissed with costs to the said C.

C,
By E and F,
Attorneys.

The foregoing motion is filed in good faith; is, in our judgment, sufficient in law, and is without any intention of causing delay.

E.
F.

27. MOTION TO DISMISS BILL OF COMPLAINT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 129—In Equity.

A,
Complainant,
vs.
B Company et al.,
Defendants.

Motion.

And now comes the defendant, B Company, and says that this case does not really and substantially involve a dispute or controversy properly in the jurisdiction of this court, in that the value of the subject matter as alleged is not truly stated or alleged in good faith. And this defendant says the value of the subject matter involved in this suit does not exceed the sum of three thousand dollars exclusive of interest and costs. All of which it

avers to be true and sets up the same in bar of the complaint in the bill and prays the Court to dismiss the said bill and give it judgment for its costs.

C and D,
Attorneys for B Company.

We hereby acknowledge receipt of the within motion.

E and F,
of Counsel for A.

Dated at Dayton, Ohio, this 22nd day of May, 1917.

28. MOTION TO QUASH AND DISMISS ANCILLARY BILL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, Receiver of the B Company, an Ohio Corporation, a Citizen of the State of Ohio,
Plaintiff,
vs.
The B Company, an Ohio Corporation, et al.,
Defendants.

No. 2.

MOTION TO QUASH AND DISMISS ANCILLARY BILL.

Now come C, D, et al., who have been severally served with a subpoena in chancery, in the above entitled action, and by protestation not confessing or acknowledging any part or all of the matters in ancillary bill in chancery herein mentioned to be true, in such manner and form as the same are therein set forth and alleged, and expressly refraining and refusing to enter their respective appearances herein for any other purpose than the purpose of this their several motion, severally move the Court to quash and set aside the said service of subpoena upon each of them severally and for the dismissal of the said bill for the following reasons:

First. That there is a misjoinder of parties defendant in the said Bill.

Second. There is a non-joinder of parties who should be made defendants in said Bill, if properly maintainable herein.

Third. That said Bill does not state facts sufficient to constitute a valid cause of action in equity against these several defendants.

E,
Solicitor for the Aforesaid Several Defendants.

29. MOTION FOR BILL OF PARTICULARS.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Complainant,
vs.
The B Company and The C Company,
Defendants.

In Equity—No. 8.

And now comes the defendant, The B Company, and moves this Court for an order requiring the complainant to make a further and better statement of the nature of the claim and further and better particulars of its cause of action in accordance with Rule 20 of the Rules of Practice for Courts of Equity promulgated by the Supreme Court of the United States on November 4, 1912; and it prays for the entry of the annexed form of order, or for such other and further relief as may be deemed equitable in the premises.

The B Company,
By C, D, E and F,
Its Solicitors.

Dated, Dayton, Ohio, September 29, 1913.

30. ORDER TO COMPLAINANT, TO FILE BILL OF PARTICULARS.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Complainant,
vs.
The B Company and the C Company,
Defendants.

In Equity—No. 8.

This cause having come on to be heard at this term upon the motion of the defendant, the B Company, for bill of particulars, and the same having been taken under advisement, it is

Ordered that the complainant, within twenty days from the date hereof, file with the clerk of this Court and serve upon the solicitors for the defendant, the B Company, a bill of particulars as follows: (a) Specifying and identifying each of the cash registers of the defendant which is alleged to be an infringement of the patents in suit, (b) which of the patents in suit is alleged to be infringed by each of such cash registers, and (c) which of the claims of each of the patents in suit is alleged to be infringed by each of the cash registers so specified; and it is further

Ordered that the defendant, the B Company, have forty-five days from and after the filing and service of said bill of particulars upon its solicitors within which to prepare and file its answer to the bill of complaint herein.
Dated, October, ..., 1913.

HOLLISTER, U. S. District Judge.

31. BILL OF PARTICULARS.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs.
The B Company and The C Company,
Defendants.

In Equity—No. 8.

BILL OF PARTICULARS.

Now comes the plaintiff, and not waiving or intending to waive or abandon either or any of the claims set forth in the several patents owned by her and mentioned and described in the bill of complaint heretofore filed herein, submits the following particulars in regard to her allegation of infringement and the claims relied upon, together with the type of machines of the defendant, The B Company, showing such infringement; it is not the intention, however, of the plaintiff to waive her right to claim infringement by other machines of different types owned, manufactured, sold and used by the defendant, The B Company, of which the plaintiff now has no definite knowledge.

1. That the type of machine classified by The B Company as the 300 line type with autograph infringes claims 15 and 42 of the United States patent 810,376.

2. The 300 line type with printer attached infringes claims 30, 31, 41, 42, 45, 62 and 63 of United States patent No. 810,376.

3. Etc.

D, E and F,
Attorneys for A.

Cincinnati, Ohio, Nov. 22, 1913.

32. MOTION TO PERMIT INTERVENTION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

The A Company, a Corporation, and B, its Trustee in Bankruptcy,
Plaintiffs,
vs.
The C Company, a corporation, and The D Company, a corporation,
Defendants.

No. 61—Equity.
Motion to Permit The E Company to Intervene.

Now comes the E Company, a corporation of the State of Ohio, and states that it recovered a judgment against the C Company on the 26th day of October, 1915, in the Superior Court of Cincinnati in case No. 56256, which is wholly unsatisfied and has never been reversed.

Now the said E Company moves the Court to permit it to intervene in this case and set up its rights on said judgment on the ground that this Court having rightful jurisdiction in this case and having first assumed jurisdiction and also that the jurisdiction involves the title and disposition of certain property formerly belonging to the C Company which was sold and bought in by a bondholders' committee and thereafter turned over to the D Company; and the issues in this case involve the action and judgment of this Court upon the status of said property and upon the question of the final disposition of said property in the case complainant herein should prevail, and this moving defendant having claims of the same character as the complainant's claim and being entitled to the same rights; this intervention is merely ancillary to the main case already pending in this Court.

S,
Solicitor for E Company.

33. ORDER GRANTING LEAVE TO FILE INTERVENING PETITION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

The A Company et al.,
vs.
The B Company.

Equity—No. 61.

Upon application of the E Company, and by consent of the defendants, leave is hereby granted the E Company to file an intervening petition herein, and the same is filed forthwith.

HOLLISTER, U. S. District Judge S. D. O.

34. MOTION FOR LEAVE TO FILE INTERROGATORIES.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 11.

The A Company,
Complainant,
vs.
The B Company,
Defendant.

Motion.

Now comes the defendant and represents to the Court that the testimony of C, residing at Baltimore, Md., and of D, residing at Atlanta, Ga., is of essential importance to the defendant in this cause, and that it is impossible to procure their attendance at the hearing of the cause now set for July of

the present year, and moves the Court for an order authorizing the defendant by its counsel to take the depositions of said persons as witnesses at Atlanta, Georgia, or elsewhere, at such time as may be practicable during the month of June, 1914, upon due notice of time and place to complainant's counsel; the same to be taken before any notary public or other officer duly authorized thereto.

The B Company,
By E and F,
Attorneys.

35. ORDER GRANTING LEAVE TO FILE INTERROGATORIES.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 11.

The A Company,
Complainant,
vs.
The B Company,
Defendant.
Entry.

This cause coming on to be heard upon the motion of defendant to be authorized to take the depositions of C and D, both non-residents of this district and state, and it being made to appear that the testimony of said parties is important to the defense, and that conditions have arisen making the taking of their depositions necessary, authority is hereby given defendant to take the said depositions prior to June 20th prox., before any notary public or other duly authorized officer, upon due notice to the complainant, the same to be filed prior to the hearing of the cause.

HOLLISTER, Judge.

36. MOTION TO TRANSFER ACTION FROM THE EQUITY SIDE TO THE LAW SIDE OF THE COURT.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs.
B Mfg. Company,
Defendant.
No. 171.
Motion to Transfer Action from the Equity Side to the Law Side of the Court.

Plaintiff moves Court that the above action be transferred from the equity side of the Court to the law side, for the reason that it was filed in equity through error.

C and D,
Attorneys for Plaintiff.

37. ENTRY TRANSFERRING ACTION FROM THE EQUITY SIDE TO THE LAW SIDE OF THE COURT.

A,
Plaintiff,
vs.
B Mfg. Company,
Defendant.

No. 171.
Entry Transferring Action from the Equity Side to the Law Side of the Court.

It appearing to the Court that the above action was through error, brought in equity, it is ordered that said action be transferred to the law side of this Court under the provisions and requirements of Equity Rule No. 22.

HOLLISTER, Judge.

38. TRIAL NOTICE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
vs.
B,

No. 50.
Notice.

To C, Attorney for B:

Please take notice that A will apply to the Clerk of said Court, to have the above case set for trial at the October Term thereof, A. D. 1917.

D,
Attorney for A.

Service of the above notice is hereby acknowledged this ..... day of ....., 191...

.....
Attorney for .....

39. STIPULATION TO DROP CASE FROM TRIAL CALENDAR.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

The A Company and B,
vs.
The C Company.

In Equity.
No. 18.

STIPULATION.

It is stipulated by and between counsel that in view of the fact that the negotiations have been and still are pending between the parties for the settlement of this suit, it is to the mutual interest of the parties to drop the case

from the trial calendar under Equity Rule 57, and that the accompanying order be entered.

Deposit has been made by complainant ample to cover any costs heretofore incurred.

Respectfully submitted,

D,
Counsel for Complainant.
E,
Counsel for Defendant.

40. WAIVER OF TRIAL JURY.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, Trustee in Bankruptcy of B, doing business under the firm name of B and C,
Plaintiff,
vs.
D, as County Auditor of Lawrence County, Ohio, and the E Bank, a corporation of Ironton, Ohio,
Defendants.

WAIVER.

We, the attorneys for the respective parties, hereby waive, in writing, the trial to a jury of this cause, and agree to submit the same to the Court without the intervention of the jury.

F. and G,
Attorneys for defendant, the E Bank of Ironton, Ohio, and for defendant D as Auditor of Lawrence County, Ohio.
H and I,
Attorneys for A, Trustee in Bankruptcy of B, doing business under the firm name of B and C.

41. SUBPOENA DUCES TECUM.

The United States of America,
Southern District of Ohio,
Western Division. } ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To A.—Greeting:

We recommend and strictly enjoin you and each of you, that laying aside all manner of business and excuses whatsoever, you and each of you be and

appear in your proper person before the United States District Court, within and for the district and division aforesaid, at the court rooms, in the City of Dayton, Ohio, on Saturday, the 28th day of July, 1917, at ten o'clock A. M., and also that you bring with you and produce at the time and place aforesaid, copies of letter-heading, literature and advertising matter used by the defendant, A Company, between January 1st, 1888, and January 1st, 1913; also copies of all advertising matter, literature and letter-heading employed by the defendant, A Company, since September, 1916. Also all specimens of name-plates or other marks of identification employed by the defendant, A Company, between January 1st, 1888, and January 1st, 1913.

Then and there to testify on behalf of complainant what you and each of you may know, in a certain action pending in said Court, wherein B, etc., are plaintiffs and A Company defendants.

And this you do under the penalty of the law.

Witness the Honorable Howard C. Hollister, Judge of the District Court of the United States, this 28th day of July, A. D. 1917, and in the 142nd year of the Independence of the United States of America.

Attest: B. E. DILLEY, Clerk.
By F. V. LAMB, Deputy.

42. APPLICATION FOR WRIT OF ASSISTANCE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 164.

A et al.,
Complainants,
vs.
B,
Defendant.

Now come the complainants and represent to the court that the receiver, C, Esquire, heretofore appointed herein, has made demand upon the defendant for delivery to him as such receiver of money, check books, bank books, personal property, certificates of stock of the D Real Estate Exchange and the B Company, and deeds for real estate in Warren County, Ohio, and in the State of Oklahoma, the foregoing being property acquired in whole or in part by use of moneys derived by the said B from the complainants herein and others in like case by the frauds set forth in the bill of complaint herein, and that the said B has failed and refused to deliver any portion of said property, claiming that he has no property resulting from the use of such moneys. Complainants aver that they do not believe that the denial of said defendant is true, and therefore make this application for a writ of assistance or other appropriate inquiry or proceeding for determination whether the said B is possessed of such property or has control of the same which he could turn over to the receiver in this case, and further pray that an order be made upon the said B to turn over to the receiver in this case all property to which

the appointment of receiver is applicable, and that failing to do so he be punished for contempt.

E, F, G and H,
Solicitors for Complainants.

43. ORDER OVERRULING MOTION FOR WRIT OF ASSISTANCE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A et al.,
Complainants,
vs.
B,
Defendant.

In Equity No. 164.
Entry Overruling Motion and Application of Complainants.

This cause came on to be heard upon the application of complainants for a writ of assistance or other appropriate inquiry for determining whether defendant B is possessed of certain properties referred to and set out in said application, or has control of same, which he could turn over to the receiver heretofore appointed herein, and was argued and submitted to the Court.

Whereupon the Court, after due consideration thereof, does overrule said motion and application, to all of which complainants by their counsel except.

HOLLISTER, Judge.

44. MOTION FOR RECEIVER AND AN INJUNCTION.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs.
The B Company, a corporation incorporated and organized under the laws of Ohio, C, D, E, F, et al.,
Defendants.

No. 38.
Motion for Receiver and an Injunction.

Now comes the plaintiff, A, and respectfully moves the court for the appointment of a receiver and an injunction as prayed for in the petition pendente lite.

G and H,
Attorneys for Plaintiff.

45. ORDER APPOINTING RECEIVER.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, *Plaintiff,* vs. The B Company, a corporation incorporated and organized under the laws of Ohio, C, D, E and F, et al., *Defendants.*	No. 38. Entry Appointing Receiver.

This cause came on this day to be heard on the motion of the plaintiff and certain of the defendants for the appointment of a receiver, and the Court finds under the peculiar circumstances of the case that justice to the parties requires the services of an indifferent person to preserve the property of the above named corporation until steps for its reorganization can be taken by its actual owners.

It is therefore ordered that G be and he hereby is appointed such temporary receiver, until further order of the Court, of all the property, real and personal, equitable interests and things in action belonging to the said B Company wheresoever the same may be found or situate, and the said receiver upon being duly qualified according to law is ordered to take charge of all and singular the property, books, accounts and papers of the said company and to have exclusive charge of the business and affairs thereof and for the purpose of maintaining the business as a going concern to continue the operation of the business of the said company for sixty (60) days from the date of this order. All parties hereto and all other persons having any of the said property in their possession or under their control are hereby ordered to deliver the same, and all persons owing any such money belonging to the said corporation are hereby directed to pay over the same to the said G as such receiver.

The said receiver is hereby authorized to draw checks against the funds of the corporation; to collect by suit or otherwise all moneys due or to become due the said corporation; to hire and discharge help and employes of all kinds necessary in the carrying on of the said business; to buy material or personal property of any sort necessary in the conduct of the said business; to pay from the funds of the said corporation all expenses of every sort necessary in the conduct of the said business; to pay from the funds of the said corporation all and any of the debts of the said business now due or to become due; to obtain an extension of time for the payment of said debts if advisable and sign any renewal notes or obligations necessary therefor; to bring, defend and compromise all suits at law or in equity in which the said corporation is now or may become a party; and in every other way do everything that is necessary in the conduct of the said business as fully and completely as the said corporation could do through its board of directors and officers.

It is further ordered that before entering upon his duties as such receiver, said G execute a bond to the B Company to the satisfaction of the Court

herein in the sum of ten thousand ($10,000.00) dollars conditioned for the faithful and honest performance of his duties.

In making this order the Court does not in any way pass upon the legal right of the plaintiff or any party hereto to have a permanent receiver appointed or the propriety of appointing a receiver in the premises, and the Court hereby specifically reserves such questions for future determination, this appointment being made merely for the preservation of the rights of the parties and the property of the B Company. And the Court further reserves the right to make such further orders from time to time as may be necessary in the premises.

And now came said G and presented his bond with the H Surety Company as surety, which bond the Court hereby approves.

HOLLISTER, Judge.

46. ORDER TO TAKE PRO CONFESSO.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,

A,
Complainant,
vs.
B Mfg. Company,
Defendant.
In Equity—No. 42.

ORDER TO TAKE PRO CONFESSO.

It appearing to the Court that the answer to the bill in equity in the above-entitled cause was filed in this Court on the 25th day of August, 1914; and it appearing in the answer that a set-off or counterclaim was incorporated in said answer; and it appearing that no reply under the rules has been filed within ten days from the filing of the answer or since then.

Therefore, on motion of C, solicitor for the defendant, it is ordered and decreed that so much of the answer as sets forth said counterclaim or set-off be taken pro confesso as to said complainant.

HOLLISTER, U. S. District Judge.

September 19, 1914.

47. MOTION TO VACATE ORDER PRO CONFESSO.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A,
Plaintiff,
vs.
B Mfg. Company,
Defendant.
In Equity—No. 42.

And now comes A, the plaintiff in the above entitled cause, by his counsel, and moves this honorable Court to set aside the "order to take bill pro

confesso'' entered herein on or about the 19th day of September, 1914, and that an order be entered that the plaintiff may have until October 15, 1914, in which to file his answer to the set-off or counterclaim incorporated in the defendant's answer.

In support of this motion there is filed herewith an affidavit of C, counsel for plaintiff.

C,
Counsel for Plaintiff.

Dated, New York, October 2, 1914.

48. ENTRY SETTING ASIDE ORDER TO TAKE BILL PRO CONFESSO.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,

A,
Plaintiff,
vs.
B Mfg. Company,
Defendant.

Equity No. 42.
Entry Setting Aside Order to Take Bill Pro Confesso.

This cause coming on this day to be heard on the motion of the plaintiff to set aside the ''order to take bill pro confesso'' entered herein on the 19th day of September, 1914, and on the evidence and on the argument of counsel, and the Court being fully advised, on consideration thereof, finds said motion to be well taken and grants the same.

It is therefore ordered by the Court that said ''order to take bill pro confesso'' be and the same is hereby set aside and held for naught; that the plaintiff herein pay all costs that have accrued in this case from the filing of the Bill of Complaint to the day of the entering of this order and the said defendant having expressed a desire to amend its answer, said defendant is hereby granted twenty days' time in which to file said amended answer herein, and the plaintiff is hereby granted twenty days' time from the filing of the amended answer in which to file a reply to said amended answer.

HOLLISTER, Judge.

49. PETITION FOR APPEAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company,
Complainant,
vs.
B Mfg. Company,
Defendant.

In Equity—No. 11.
Petition for Appeal.

The above named defendant, conceiving itself aggrieved by the decree and orders made and entered in the above entitled cause, on the 22nd day of De-

ecember, 1914, does hereby appeal from said decree and orders to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors filed herewith, and prays that said appeal may be allowed and that a duly authenticated transcript of the record proceedings and papers upon which said decree and orders were made may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

The B Mfg. Company,
By C and D,
Attorneys for Defendant.

Dated, January 20th, 1915.

The foregoing claim of appeal is allowed.

HOWARD C. HOLLISTER, District Judge.

50. ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company, *Complainant,*
vs.
B Mfg. Company, *Defendant.*
In Equity—No. 11.
Assignment of Errors.

Now comes the said defendant by its solicitors and says that in the interlocutory decree heretofore rendered in this cause on the 22nd day of December, 1914, the Court erred in the following particulars:

(1) In holding Letters Patent No. 721,987 to C, mentioned in the Bill of Complaint in this cause, good and valid in law.

(2) In holding that said defendant, B Mfg. Co., had infringed both claims of said patent by its manufacture and sale of hames embodying said invention described and claimed in said patent. And defendant says that the Court also erred in the following holdings—embodied in and constituting the basis of those above mentioned and of the decretal orders for injunction and accounting for profits and an inquiry of damages—to-wit:

Etc.—

Whereupon, defendant prays that said decree may be reversed.

The B Mfg. Company,
By D and E,
Its Solicitors.

51. BOND ON APPEAL.

Know All Men by These Presents:

That we, the B Mfg. Company, as principal, and F and G, as sureties, are held and firmly bound unto the A Company, in the full and just sum of one thousand dollars, to be paid to the said A Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our

heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of December in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court, between the A Company as complainant and the B Mfg. Company as defendant, an interlocutory decree and order of reference for an inquiry of damages and profits was rendered against the said B Mfg. Company, which said decree and order also directed the issue of a perpetual injunction against said defendant, which said decretal order of reference and for injunction was upon motion of the defendant suspended by the Court pending an appeal by said defendant, of said cause to the Circuit Court of Appeals for the Sixth District, to be taken within thirty days from December 22nd, 1914.

Now, the condition of the above obligation is such, That if the said A Company shall prosecute said appeal to effect, and answer all damages and cost if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

B Mfg. Company.

B Seal

F Seal

G Seal

C

D

Approved by

HOLLISTER, Judge.

Southern District of Ohio, ss.

I, F, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth two thousand dollars in real estate in my own name, situate in the County of Clinton, in said district.

F,

Sworn to before me on the 23rd day of December, 1914.

N P,

Notary Public.

Southern District of Ohio, ss.

I, G, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth two thousand dollars in real estate in my own name, situate in the County of Clinton in said district.

G,

Sworn to before me on the 23rd day of December, 1914.

N P,

Notary Public.

52. PRAECIPE OF APPELLANT FOR PORTION OF RECORD TO BE INCORPORATED INTO TRANSCRIPT OF APPEAL.

No. 11.

A Company,
Complainant,
vs.
B Mfg. Company,
Defendant.
} Praecipe.

To the Clerk:

You will please prepare the record in the above entitled cause for filing in the appeal taken from the decision of the District Court to the Circuit Court of Appeals, to include the following papers only:

(1) The pleadings: Interlocutory decree; petition for rehearing and entry; motion for and entry on suspension of injunction, etc.; petition for appeal; assignment of errors; citation.

(2) The affidavits, depositions and testimony of witnesses in the cause as reduced to narrative form by the defendant and herewith presented typewritten, under General Equity Rule No. 75.

(3) Documentary exhibits as follows:

(a) File wrapper and contents Wiedrich patent 721,987.

(b) File wrapper and contents Lawson patent 734,074.

(Both in part as per mas. herewith submitted.)

(c) Copies of patents cited in answer, as follows: Kaffer, 1866; Hugill, 1882; James, 1887; Stearns, 1888; Swigert, 1892; Knisley, 1892; Schellhammer, 1897; Swigert, 1899; Surghnor, 1899; Dodson, 1899; Lawson, 1903; Knapp, 1873; Phillips, 1881; Powers, 1888; Dumas, 1897; Hopking, 1884; Johnson, 1887; and patent in suit to Wiedrich, 1903.

(Patent office copies to be furnished by defendant for binding.)

(d) Copies of p. ———— 1900 catalogue.

(To be furnished for binding by defendant.)

(4) The testimony taken and filed in the cause, being Expert Affidavits of C and D; Deposition of C taken at Knoxville, Tenn., June 19, 1914; and oral testimony of witnesses given during the hearing of the cause;—all of which has been reduced to narrative form, typewritten, as per Equity Rule 75, and is herewith filed and a duplicate of which has been also delivered to Mr. S, solicitor and of counsel for plaintiff, together with service of a copy of this praecipe.

H & K,
Solicitors and of Counsel for Defendant.

53. PRAECIPE OF APPELLEE FOR PORTIONS OF RECORD TO BE INCORPORATED INTO TRANSCRIPT ON APPEAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company,
Complainant,
vs.
B Company,
Defendant.
In Equity No. **11.**

PRAECIPE.

To the Clerk:

You will please include in the transcript on appeal the following:
A copy of Wiedrich Patent 721,987.
Complainant's Exhibit Drawing of Deft's Hame.
Deft's Exhibit Assignment.
Complainant's Exhibit 1902 Catalogue.
Complainant's Exhibit Western Hame 1897 Catalogue.
Star Hame Company Catalog.

C,
D,
E,
Solicitors and Counsel for Complainant.

54. MOTION TO APPROVE NARRATIVE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. **11.**

A Company,
Complainant,
vs.
B Mfg. Company,
Defendant.
Motion.

Now comes the defendant and having, as required by General Equity Rule No. 75, reduced the testimony in the cause to narrative form, and lodged same with the Clerk of this Court on January 30th, 1915, and at the same time served a copy thereof upon the complainant's counsel; and said complainant having on February 12, 1915, served defendant with a list of proposed alterations and additions which defendant cannot accept,—moves the Court to approve the narrative as submitted, or to make such order as it may deem just in the premises.

The B. Mfg. Company,
By C and D,
Solicitors and of Counsel.

55. STIPULATION AS TO CONTENTS OF PRINTED RECORD ON APPEAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A Company, *Complainant*,
vs.
B Mfg. Company, *Defendant*.
} In Equity No. 11.

STIPULATION.

It is agreed by and between counsel for the parties respectively that the printed record on appeal shall contain the following, only:

(1) The Bill—March, 1913.
Answer—September, 1913.
Amendment to Answer—23rd March, 1914.
Amendment and supplement to Answer—October 2, 1914.
Decree—December 22, 1914.
Entry refusing rehearing—December 22, 1914.
Entry suspending injunction.
Petition for Appeal.
Assignment of errors.
Entries extending time for filing appeal.
Citation for Appeal.

(2) Affidavit of Wm. A. McCallum.
Affidavit of John F. Schroeder.
Deposition of John F. Schroeder.
} In narrative form.

(3) Oral testimony of witnesses taken at the hearing and adjournments. (Stenographically reproduced.)

(4) Documentary Exhibits as follows:

Patent office copies of the following letters patent: Kaffer, Hugill, James, Stearns, Swigert, Knisley, Schellhammer, Swigert, Surghnor, Dodson, Lawson, Knapp, Phillips, Powers, Dumas, Hopking, Johnson, Wiedrich, Kirksey 173,022.

File wrapper and contents of Lawson and Wiedrich applications for patent, omitting the specification in each case, but stating the original claims (both patents being presented in the foregoing list).
Page 27, 1900 Catalog of Western Hame Works.
Drawing submitted by Chaise, Complainant's Expert.
Exhibit B Company Catalogue.

The structural exhibits used at the hearing to be used on the appeal hearing as counsel may desire.

F and G,
For the B Mfg. Company.
H,
For the A Company.

56. MANDATE OF U. S. CIRCUIT COURT OF APPEALS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The United States of America,
Sixth Judicial Circuit. } ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Greeting:

Whereas, lately in the District Court of the United States for the Southern District of Ohio, before you or some of you, in a cause between A Company, complainant, and B Company, defendant, a decree was entered December 22, 1914, in favor of said complainant and against said defendant, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord, one thousand nine hundred and fifteen, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said District Court with directions to dismiss the bill.

November 12, 1915.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the twenty-first day of December, in the year of our Lord one thousand nine hundred and fifteen.

Costs of Appellant:

Clerk ..... $.....
Printing Record ....
Attorney ....
$.....

.....
Clerk of the United States Circuit Court of Appeals for the Sixth District.

57. ORDER DISMISSING BILL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

No. 11.

A Company,
Complainant,
vs.
B Mfg. Company,
Defendant.
In Equity.

ENTRY OF DISMISSAL.

This day this cause coming on to be heard upon the mandate heretofore filed in this case from the U. S. Circuit Court of Appeals, Sixth Circuit, in which the finding of said Court was in favor of the B Mfg. Company, against the A Company, remanding this cause to this Court with instructions to dismiss the Bill in Equity with costs in favor of B Mfg. Company, as against A Company, and the Court being fully advised in the premises, hereby orders that the Bill in Equity in this case be, and the same is hereby dismissed with costs against the A Company.

HOLLISTER,
U. S. District Judge, Southern District of Ohio, Western Division.

Approved as to form:
H,
Counsel for Plaintiff.

58. PETITION FOR REMOVAL.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, as trustee,
Plaintiff,
vs.
B et al.,
Defendants.
Petition for Removal of Cause from the Common Pleas Court of Greene County, Ohio.

To the Honorable, the Judge of the District Court of the United States for the Southern District of Ohio:

Your petitioner, the above-named B, respectfully shows to this honorable Court that A, as plaintiff, on February 4, 1919, brought an alleged suit in the Common Pleas Court of Greene County, Ohio, against your petitioner as defendant; that the matter in dispute in said pretended cause exceeds the sum or value of $3,000, exclusive of interest and costs; that said controversy is between citizens of different states; that the present time is before the trial thereof; that at the time of the commencement of said suit and ever since,

said plaintiff has been and is now a citizen of Ohio while defendant has been and is now a citizen of Maryland; that your petitioner desires to remove said suit before the trial thereof into this Court. Said suit is in pursuance of an attempt to utilize adverse local influence in said county in getting a local court to decide questions now pending in this Court—the very same questions brought before this Court in a suit by your petitioner as plaintiff against said Finney as defendant, No. 165, in equity, to-wit, the rights of petitioner to a so-called fund in said A's custody and the rights of said A to act as trustee of all of said "fund," whose value exceeds $10,000. The suit in this court began January 16, 1919, before the pretended beginning of that in said state court, and said state court has no jurisdiction to try or decide said questions while they are pending in this court, and cannot give them any valid trial.

Your petitioner further shows unto this honorable court that from prejudice and local influence in favor of plaintiff and adverse to defendant, he will not be able to obtain justice in said court or in any other state court to which said defendant may, under the laws of Ohio, have a right to remove said cause on account of said prejudice or local influence. The number of said cause is 14,965 (petitioner is informed).

Wherefore your petitioner prays that an order be entered for the removal of said cause from said Common Pleas court to this court and for the issuance of a writ of certiorari commanding the return to this court of a certified copy of the record in said state court.

B.

State of Ohio, Hamilton Co., ss:

B, being duly sworn, says that he is defendant in the above-entitled petition, that he has read the same, and believes the allegations therein to be true.

B.

Subscribed and sworn to before me this 21st day of April, 1919.

N. P.,
Notary Public, Hamilton Co., Ohio.

59. ORDER GRANTING REMOVAL AND DIRECTING THE ISSUANCE OF A WRIT OF CERTIORARI.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, as Trustee, *Plaintiff.*
vs.
B, et al., *Defendants.*
Equity No. 173.

ORDER.

This cause came on to be heard upon petition and affidavit of B at this term and was argued by counsel for the defendant, B; and thereupon motion

for writ and upon consideration thereof, it was ordered, adjudged and decreed that this cause, which is numbered 14,965 in the Common Pleas Court of the State of Ohio in and for the County of Greene, be, and it hereby is removed to the United States District Court for the southern district of Ohio, Western division, and that a writ of certiorari issue to the clerk of the Common Pleas Court, with a copy of this order, directing said clerk to certify and send to this court the record of the proceedings in said case and court.

HOLLISTER, Judge.

60. WRIT OF CERTIORARI.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Common Pleas Court of the State of Ohio, in and for the County of Greene, Greeting:

It being represented to us that there is now pending before you a certain cause No. 14,965, wherein A as trustee, is plaintiff, and B, et al., are defendants, which cause was commenced in the Common Pleas Court of the State of Ohio, in and for the County of Greene, by A, as trustee, against the said B et al., for the purpose of determining the rights of the said B to a so-called fund in said A's custody, and the rights of said A to act as trustee of said fund, and that no trial has yet been had; and whereas, said defendant B has caused to be filed in our district court for the southern district of Ohio, western division, his petition for the removal of the said cause from the Common Pleas Court to the District Court of the United States for the Southern District of Ohio, Western Division, and has made it appear to us that, from prejudice or local influence he will not be able to obtain justice in such state court or any other state court to which the defendant may, under the laws of the state, have the right to remove the said cause, we are willing to remove the said cause, and that the records and proceedings therein should be certified by said Common Pleas Court and removed into our District Court of the United States in and for the Southern District of Ohio, Western Division, and do hereby command you to certify and send the records and proceedings aforesaid, with all things concerning the same, to the said district court of the United States, together with this writ, so that you may have the same at the United States courthouse, in the City of Cincinnati, in the said District and Division, in the said District Court to be then and there held, that the said district court may cause to be done thereupon what of right, according to the laws of the United States, should be done.

Witness, the Honorable Howard C. Hollister, Judge of said District Court, and the seal of the said District Court hereto affixed, the 1st day of May, A. D. 1919.

B. E. DILLEY,
Clerk of said District Court.
By F. V. LAMB, Deputy.

61. ORDER REMANDING CASE.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
Western Division.

A, Trustee,
Plaintiff.
vs.
B, et al.,
Defendant.

In Equity.
No. 172.

ENTRY.

This day this cause came on to be heard upon the pleadings and the evidence. Upon due consideration whereof the Court finds that the evidence fails to show that B the defendant is unable to obtain justice as a citizen of the United States on account of prejudice or local influence in the Common Pleas Court of Greene County, Ohio, the Court at which said action originated, and the Court further finds that there is no ground for the removal of said cause as expressed in the petition filed in said cause.

It is therefore ordered, adjudged and decreed by this Court that said cause be remanded back to the said Court of Common Pleas of Greene County, Ohio, the Court at which the cause originated, and the Clerk of this Court is hereby instructed and directed to forward all papers and pleadings filed in the said Common Pleas Court to the Clerk of the Common Pleas Court of Greene County, Ohio, together with a copy of this Entry remanding same to the said Court for further disposition.

To all of which the defendant B, in open court was allowed an exception. Form as per Equity Rule 75, type-written, and is herewith filed, and a duplicate of which has been also delivered to E, Solicitor and of counsel for plaintiff, together with a copy of this Praecipe.

F and G,
Solicitors and of Counsel for Defendant.

Service hereof and receipt of copy of typewritten duplicate under items 2, 3, (a), (b), and 4 of this praecipe acknowledged this 29th day of January, A. D. 1915.

E,
Solicitor and of Counsel for Complainant.

QUESTIONNAIRE IN FEDERAL PROCEDURE

I.

INTRODUCTORY.

1. By what authority were federal courts created?
2. What body may create federal courts?
3. Was it obliged to create any such courts?
4. With what authority did the courts so created have to be endowed?
5. Is a Provost Court a federal court?
   What jurisdiction may it be given?
6. Is there any federal common law?
7. Do the rules of the common law furnish the guide in the construction of federal laws?
8. Does the common law as to procedure ever furnish a guide for the federal courts?
9. To give a federal court jurisdiction of a case must the federal constitution and statute law concur in granting it?
10. What duty has a federal court to determine whether or not it has jurisdiction of a case?
11. Must the record of the court show affirmatively that it has jurisdiction?
    What is meant by this?
12. May the fact that there has not been proper service be waived, so that the federal court may hear the case? If so, how is this done?
13. May the fact that the federal court has not jurisdiction over the subject matter be waived, so that the federal court may hear the case? If so, how is this done?
14. Is there any presumption as to the jurisdiction of a federal court in relation to a case?
15. Is the question of jurisdiction independent of that having to do with the merits of the case?
16. Who has the burden of proving that the court has jurisdiction?

II.

DISTRICT COURTS.

A. ORGANIZATION.

17. Section 2. What is the salary of judges of the federal district courts?

18. Section 4. How are deputy clerks of federal district courts appointed and removed?

19. Section 4. Who takes the place of the clerk of a federal district court in case of his death?

20. Section 4. What liabilities does such a clerk's bond cover?

21. Section 4. What recourse has such a clerk, or his representative after his death, when he, or his representative, pays for losses occasioned by the default of a deputy clerk?

22. Section 6. Where are the records of federal district courts kept?

23. Section 7. What is the result of changing the time for holding court upon cases, etc., already in progress before the change?

24. Section 8. What is the result of the arrival of the time for another session of court upon actions already pending? When is such an action pending?

25. Section 9. What, if any, acts may be done by a federal court or judge while a session of the court is not being held?

26. Section 10. May federal district courts hold adjournments for the trial of criminal causes?

27. Section 11. Under section 11 may an adjournment be equivalent to an order that there shall be a special term?

28. Section 12. In what way may a judge of the federal district court have such court adjourned when he cannot attend?

29. Section 13. May another judge ever be appointed to temporarily fill the place of a judge of a federal district court, who is disabled from doing his work? If so, who may be appointed, and how is the appointment made?

30. What is meant by a "judge de facto"?

31. Section 14. May a judge be appointed to aid another judge, if the business of the latter has accumulated so that he cannot attend to it? If so, who may be appointed, and how is the appointment made?

32. Section 15. When, if ever, does the chief justice of the United States Supreme Court make the appointment provided for in sections 13 and 14?

33. Section 16. May appointments made under the authority of sections 13, 14, and 15 be revoked? If so, who revokes? May new appointments be made after such revocation?

34. Section 17. How is an appointment authorized by section 17 made?

35. Section 18. Under what, if any, circumstances may a judge of one district be assigned to hold court in another district? How

is the assignment made? May a judge appoint himself to thus serve?

36. Section 19. What are the duties of judges appointed as provided by sections 13 through 18? What is the effect of the acts of such a judge serving under the appointment provided for by those sections?

37. Section 20. What is meant by the following terms in section 20:

(1) "in any way concerned in interest in any suit," (2) "of counsel," (3) "material witness"?

38. Section 20. For a judge to be of counsel so that he is disqualified from sitting in a case, must he be connected as counsel with the very case in which he is sitting?

39. Section 20. Who is to decide whether or not a judge is disqualified under section 20?

40. Section 20. What are the proper proceedings to take to have a disqualified judge replaced by another judge?

41. Section 20. May there be a waiver of the right to object because of such disqualification?

42. Section 21. May the personal bias or prejudice of a judge of a federal district court be the grounds of removal? If so, what is the procedure used to obtain a change of judges? How many changes may be obtained?

43. Section 22. What is the effect of a vacancy in the office of a judge of a federal district court upon a process, pleading, or proceeding?

44. Section 22. Under section 22, what is the effect upon a bond of the postponement of a criminal trial because of a vacancy occurring between the time of the giving of the bonds, and the date set for the trial?

45. How is the business of a federal district court divided?

B. JURISDICTION.

Questions 46 through 87 are on the 24th section, 1st subdivision, of the Judicial Code.

46. What is a "suit"?

47. What, if any, distinction is there between a "suit," an "action," a "cause of action," and a "case"?

48. When is a suit one of a civil nature?

49. When is a suit equitable in its nature?

50. When is a suit brought by the United States?

51. When is one an officer of the United States?

52. When does one bring a suit in his capacity of an officer of the United States?

53. When is an action brought between citizens of the same state claiming lands under grants from different states?

54. May citizens of different states claiming lands under grants from different states get into the federal district court on that ground?

55. When does a controversy concerning a matter involve more than three thousand dollars ($3,000), exclusive of costs and interest?

(a) What is the basis of determining the amount when only money damages are claimed? Is the result the same, if the law liquidates the damages?

(b) What is the basis of determining the amount when the recovery, etc., of property other than money is involved?

(c) If the amount of damages is not computable, may the case be brought in the federal district court, if it is one in which three thousand dollars ($3,000), exclusive of costs and interest, must be involved?

(d) What claims may be joined to make up the jurisdictional amount?

(e) May attorney's fees or the value of interest coupons be included to make up the necessary amount?

(f) What is the effect of counterclaims or admitted defenses upon the amount in controversy?

56. How must the amount in controversy be pleaded?

57. When, in general, is a federal question involved in a case?

58. Does the fact that federal statutes are referred to in the pleading, or that a federal statute must be consulted to determine the meaning of a contract, or the scope or effect of a local law, or that property once owned by the United States is involved, prove that a federal question is involved?

59. If a federal question is involved, does the fact that questions of local law appear, or that the case is finally decided upon a point of local law, oust the federal district court of jurisdiction?

60. To what does one look to determine whether or not a federal question is involved?

61. Need facts of which the federal district court will take judicial notice be alleged to show that a federal question is involved?

62. Is a statement to the effect that a federal question is involved a proper fashion in which to set forth that fact?

63. May a state be sued without its consent in the federal courts by one of its citizens upon the suggestion that the case is one that arises under the constitution and laws of the United States?

64. Is a citizen of a territory deemed a citizen of a state under section 24?

65. Does a federal district court have jurisdiction over a controversy between a citizen of a state and a citizen of a foreign country and a citizen of a territory?

66. Is a citizen of a territory, the District of Columbia, or Cuba, a citizen of a state?

67. Is a tribal Indian a citizen of a state?

68. Does an averment to the effect that an action is between "a citizen of Massachusetts" and "a citizen of London" present a case between a citizen of a state of the United States and a foreign state?

69. Is a corporation of a state a citizen of that state?

70. May a citizen of a foreign country sue a citizen of another foreign country in a federal district court?

71. Must all the parties plaintiff be citizens of different states than all of the parties defendant when the jurisdiction of the federal district court is based upon diversity of citizenship?

72. What bearing upon question 71 has the fact that some of those joined are nominal parties, or that the action is ancillary? When is one a nominal party? What is an ancillary action?

73. When parties are suing or being sued in a representative capacity, whose citizenship is looked to?

74. What is meant by citizenship?

75. What, in general, is the citizenship of minors and married women?

76. May a federal district court place parties in the proper relation to a suit as plaintiffs and defendants?

77. May one effectively change his domicile for the purpose of suing in the federal district court?

78. What are the exceptions to the general rule that one cannot sue upon a chose in action in the federal district court?

79. What is meant by a "chose in action"?

80. What is meant by an "assignment" of a chose in action?

81. What is meant by a foreign bill of exchange?

82. What is meant by an "instrument payable to bearer"?

83. Is a county considered a corporation under that portion of section 24, subdivision 1, which deals with bearer instruments made by a corporation?

84. If Adams, an accommodation indorser and payee of a negotiable note is a citizen of Pennsylvania, and the maker is a citizen of Pennsylvania, and the holder is a citizen of Colorado, may the holder sue the maker in a federal district court?

85. If the action is by the holder of a note against an indorser thereof, need it be shown that the payee could have sued the maker in the federal district court on the ground of diversity of citizenship?

86. Is the citizenship of intermediate parties material if the original payee and the one suing on a chose in action are citizens of states other than that of which the original obligor who is being sued is a citizen?

87. At what time must there be a diversity of citizenship between the original obligor and obligee, and between the one suing and the one being sued?

88. Section 24-2. What is a crime?

89. Section 24-2. Have federal courts jurisdiction over common law crimes?

90. Section 24-3. What is a civil cause of maritime jurisdiction?

91. Section 24-3. Over what causes of that nature have the state courts jurisdiction?

92. Section 24-3. What amounts to a seizure?

93. Section 24-3. What facts must exist to sustain a libel in admiralty?

94. Section 24-5. What is meant by a case arising under an internal revenue law?

95. Section 24-5. What is a tonnage duty?

96. Section 24-7. When do suits arise under the patent, copyright, or trade mark laws?

97. Section 24-7. May the federal courts grant damages for past infringements?

98. Section 24-8. When do suits arise under laws regulating commence?

99. Do the commerce courts still exist? If not, what courts transact its former business?

100. Section 24-9. What are "penalties and forfeitures"?

101. Section 24-10. What is a "debenture"? What is a "drawback"?

102. Section 24-11. When does one suffer injury to person or property while he is acting for the protection or collection of revenues for the United States or to enforce the right of the citizens of the United States to vote in the several states?

103. Section 24-12. What are the conspiracies mentioned in section 24-12?

104. What is meant by a "conspiracy"?

105. What is the meaning of "citizen" as used in section 24-12?

106. Section 24-12. What is a "right or privilege of a citizen of the United States"?

107. Section 24-14. When is one deprived under color of a statute, etc., of a right, etc., secured by the constitution or laws of the United States for the equal protection of citizens of the United States, or of all persons within its jurisdiction?

108. Section 24-15. When is a suit brought to recover the possession of an office of which one has been deprived because persons have been denied the right to vote because of race, color, or previous condition of servitude?

109. Section 24-18. What is a "consul"?

110. Section 24-18. When a consul is a necessary party, may an action be brought in a federal district court against the consul and another person, though the latter could not be sued alone in said court?

111. Section 24-19. What are "matters and proceedings in bankruptcy"?

112. Section 24-20. Can the United States be sued in the federal district court without its consent?

113. Section 24-20. If A has a claim for more than $10,000, but limits his suit to that amount, may he get into the district court under this section?

114. Section 24-20. If he claims more than $10,000, where must he bring his action against the United States?

115. Section 24-20. May the United States be sued in the district court for a tort or for a war claim rejected or reported on adversely?

116. Section 24-20. What is an officer? What is a fee or salary of an officer of the United States?

117. Section 24-20. What is a set-off or counterclaim? May one be allowed a set-off or counterclaim against the United States?

118. Section 24-20. Within what time must one sue under this section? What disabilities may excuse? May the disabilities operate cumulatively?

119. Section 24-20. When does one have a contract with the United States?

120. Section 24-20. When is a claim founded upon a regulation of the executive department?

121. Section 24-20. How are suits tried under this section?

122. Section 24-21. What is the gist of the statutes which are spoken of in this section?

123. Section 24-21. If A has color of title under this statute, is he a bona fide holder?

124. Section 24-22. When does a suit arise under a law regulating the immigration of aliens, or the contract labor laws?

125. Section 24-23. When does a suit arise under a law to protect trade and commerce against restraints and monopolies?

126. Sections 26 and 27. What federal district courts have original jurisdiction over what criminal matters arising in Yellowstone National Park and the Indian reservations in South Dakota?

127. Sections 25 and 26. What appellate jurisdiction have the federal district courts?

C. REMOVAL OF CAUSES.

Questions 128 through 152 are on section 28 of the Judicial Code.

128. Can a state law deprive one of the right to remove a case to a federal court?

129. Is a state law, which provides that, if a corporation of that state removes a case to a federal court, it shall lose its charter, effective?

130. Is an agreement not to remove a case to a federal court valid?

131. If a state court has not jurisdiction of a case, may it be removed to a federal court?

132. May ancillary matter be removed after the decision of the main case has been rendered in a state court?

133. What proceedings in this relation are ancillary?

134. If a defendant puts in an answer consisting of a counterclaim, cross-complaint, or asking for an injunction, may the plaintiff get a removal?

135. May the receiver of a bank, when sued in a state court on a claim of less than $3,000, remove the case to a federal court?

136. May a sham party prevent a removal?

137. What must be done to show a party has been fraudulently joined?

138. What, in general, are the different classes of cases which may be removed under section 28?

139. What amount must be in controversy to obtain a removal in the various types of cases which are removable?

140. Must all of the parties plaintiff be citizens of states other than all of the defendants?

141. Who may remove?

142. What is a separable controversy?

143. What must be shown to obtain a removal on the ground of prejudice or local influence?

144. May a citizen of a territory, the District of Columbia, or a foreign state obtain a removal?

145. At what time must the facts exist which are the basis of a right to a removal in order to permit such a removal?

146. Within what time must one ask for a removal on the ground of prejudice or local influence?

147. What court does one ask for the privilege of obtaining a removal on the ground of prejudice or local influence?

148. What must one do to obtain a removal on the ground of prejudice or local influence?

149. Under what circumstances may a case removed to a federal court on the grounds of prejudice or local influence be remanded entirely or in part to the state court?

150. What is the proper method of having the case remanded?

151. On whose initiative is a case remanded?

152. What special legislative acts are referred to in section 28 and what is the law of removal in relation thereto?

Questions 153 through 165 are on section 29 of the Judicial Code.

153. Within what time must a removal be asked for under section 29?

154. What is the effect of treating a petition for removal as filed when it has not been?

155. Does the time for answering expire when the answer is filed?

156. If one files a petition for a removal as soon as the case is removable, is he in time?

157. Does the time within which one must file a petition for a removal begin to run until a valid service has been made upon the defendant?

158. May the time to file a petition for a removal be extended by a court or a stipulation by the parties?

159. What papers must be filed and notices given to obtain a removal under section 29?

160. What must be the forms of those documents and when must they be filed and given?

161. What is meant by "special bail"?

162. What court decides upon the right to the removal under section 29?

163. Is the mere filing of the petition in the office of the clerk of the state court sufficient?

164. What is the duty of the state court upon the filing of a petition and bond provided for in section 29?

165. Sections 28 and 29. To what federal court must a removal be made?

166. If the court remands a case, is the action of the court reviewable by appeal or writ of error? If the court refuses to remand a case, is its action reviewable by appeal or writ of error?

Questions 167 through 175 are on section 30 of the Judicial Code.

167. What type of cases is removable under section 30?

168. Within what time must a removal be requested?

169. What amount must be in controversy?

170. Who may obtain a removal?

171. If the parties are citizens of different states may they take advantage of section 30?

172. What is the method of obtaining a removal under section 30?

173. Before what court is the request for a removal made?

174. To what court is the removal made?

175. What effect has section 30 upon the offering of evidence and pleading?

Questions 176 through 187 are on section 31 of the Judicial Code.

176. What type of cases is removable under section 31?

177. Within what time must a removal be requested?

178. What amount must be in controversy?

179. Who may obtain a removal?

180. What is the method of obtaining a removal under section 31?

181. Before what court is the request for a removal made?

182. To what court is the removal made?

183. What is the duty of the state court after the filing of the proper petition by the right person?

184. What effect has a removal under section 31 upon bail or other security given in the case removed?

185. What duty is imposed upon the clerk of the state court under section 31?

186. If the removing party files the proper papers, what is the effect upon the proceedings? What if he fails to do so without any fault of the clerk of the state court?

187. What is the proper procedure, if the clerk of the state court fails to perform his duty mentioned in question 185?

188. Section 32. What is a writ of habeas corpus cum causa?

189. Section 32. When is it used under section 32.

190. Section 32. What is the procedure used in issuing such a writ?

Questions 191 through 202 are on section 33.

191. What type of cases is removable under section 33?

192. When is one appointed under or acting by authority of any revenue law?

193. Within what time must a removal be requested?

194. What amount must be in controversy?

195. Who may obtain a removal?
196. What is the method of obtaining a removal under section 33?
197. Before what court is the request for a removal made?
198. To what court is the removal made?
199. What effect has a removal under section 33 upon bail or other security given in the case removed?
200. When a suit removed under section 33 is begun in the state court by process other than capias what is the duty of the officers of the federal district court, and of the state court? Is the answer the same when it is begun by capias?
201. What is a writ of certiorari?
202. If no copy of the record and proceedings in the state court can be obtained after a removal has been perfected, what is the proper procedure? What if the plaintiff fails to proceed *de novo?*
203. Section 34. What type of cases is removable under this section?
204. Section 34. Who may obtain a removal, and within what time must it be asked for?
205. Section 34. How is the removal obtained?
206. Section 34. To what court is the removal made?
207. Section 35. Under this section what is the procedure, if the clerk of the state court improperly refuses to deliver papers? What is the effect of such refusal upon the case?
208. Section 35. What could the removing party do under this section, if he was a pauper and thus unable to pay the clerk's fees?
209. Section 36. According to this section, what is the effect of a removal upon attachments, sequestrations, bonds, securities, injunctions, or other proceedings obtained, or had prior to the removal?
210. Section 36. May the proceedings had in the state court be modified by the federal court after removal?
211. Section 37. Under what circumstances, and at what time, may a federal court dismiss or remand a case?
212. Upon such a dismissal or remanding who pays the costs of the case while it was proceeding in the federal court?

D. MISCELLANEOUS PROVISIONS.

213. Section 40. Where are offenses punishable by death tried?
214. Section 41. What are the "high seas"?
215. Section 41. When is an offense committed upon them?
216. Section 41. What is meant by "state" or "district" as used in this section?
217. Section 41. Under this section when is one found in or brought into a district?
218. Section 42. Where may an offense against the United States be tried?

219. Section 43. Where may pecuniary penalties and forfeitures be sued for?

220. Section 44. Where may actions to recover for internal revenue be brought?

221. Section 45. Where may proceedings on seizures made on the high seas for forfeiture under any law of the United States be prosecuted?

222. Section 46. Where may procedings for the condemnation of property used to promote an insurrection against the United States be had?

223. Section 47. Where may proceedings on seizures for forfeitures of vessels or cargoes entering ports of entry closed by the President in pursuance of law, or of goods and chattels coming from a state or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property or persons to or from such state or section, or of any vessel belonging, in whole or in part, to any inhabitant of such state or section?

224. Section 48. Where may suits for the infringement of letters patent be had?

225. Section 48. What is meant by a "regular and established place of business"?

226. Section 48. At what time must the "regular and established place of business" have existed in the district where the suit is brought?

227. Section 48. Upon whom must service be made in cases brought under this section?

228. Section 49. Where must proceedings by a national banking association to enjoin the comptroller of currency in the cases mentioned in this section be brought?

229. Section 50. If all the defendants are not inhabitants of, or found in, the district of which some are inhabitants, or within which some are found, may the latter be sued without joining the former? If so, what is the effect of a judgment against the latter upon the rights and duties of the former?

230. Section 51. What is the general rule as to the right to arrest a person in a civil action in a district other than the one in which the trial is to be had?

231. Section 51. What is the general rule as to the district within which one must sue another in a federal court?

232. Section 51. May this rule be changed by statutes dealing with particular matters?

233. Section 51. May there be a removal from a state to a federal court of a case in which there are several plaintiffs, citizens of different states, and the action is brought in a state in which one of the plaintiffs lives?

234. Section 51. Who may object to the fact that there is an improper joinder of parties?

235. Section 51. Does this section apply to an action by or against an alien?

236. Section 51. Under this section of what state and district is a corporation an inhabitant?

237. Section 51. What is meant by "original process or proceeding"?

238. Section 51. May one be served to answer a supplemental bill in any other district than that of which he or the plaintiff is a resident?

239. Section 51. What does "only" mean as used in this section?

240. Section 51. Is the right to be sued in the districts named in this section a personal right which may be waived? If so, what amounts to a waiver?

241. Sections 52-3-45. When are actions local, and when are they transitory?

242. Section 52. Where must a suit not of a local nature be brought, if there is but one defendant and the state in which the defendant resides contains more than one district? What if there are several defendants residing in different districts?

243. Section 52. How is service made if there are several defendants residing in different districts?

244. Section 52. If there is a judgment or decree rendered upon such service made upon several defendants, how may an execution be issued?

245. Section 53. Where must a suit not of a local nature be brought, if there is but one defendant and the district in which the defendant resides contains several divisions? What if there are several defendants residing in different divisions of the district?

246. Section 53. Where may all process subject to the provisions of this section be served and executed?

247. Section 53. In what divisions are alleged criminals to be tried?

248. Section 53. How may one obtain a change of venue of a criminal prosecution from one division to another, and what is the effect thereof?

249. Section 53. To what division are removals from state to federal courts made?

250. Section 53. By what does one gauge the time within which such a removal must be perfected?

251. Section 54. May the defendant in a local action be served in a different district than that in which the action is brought?

252. Section 55. Where may suits of a local nature be brought when the property involved lies partly in one district and partly in another district within the same state?

253. Section 56. If a receiver is appointed to care for property within different states, but within the same circuit, what are the conditions under which he may or may not have control of all of said property?

254. Section 56. Upon the making of such an appointment what

power is given to issue process, and where must orders affecting such property be entered of record?

255. Section 57. How are suits to enforce liens upon, or claims to, or to remove incumbrances or clouds upon real or personal property, proceeded with when some of the defendants are not inhabitants of, or are not found in, the district, or districts, where the land lies and do not voluntarily appear?

256. Section 57. What are suits "to enforce a claim, or to remove any incumbrance or lien or cloud upon the title to" property? What is meant by "found" as used in this section?

257. Section 57. What is the effect of a judgment for a plaintiff upon a non-resident defendant or his land in actions mentioned in question 255?

258. Section 57. What may he do after such a judgment is rendered?

259. Section 58. May a civil cause be transferred from a federal court in one division of a district to another federal court in another division of the same district? If so, how is it done?

260. Section 59. Whenever any new district or division is established or territory is transferred from one district or division to another district or division, where shall prosecutions for acts committed before the change in territory effected by the change be tried, and where shall civil suits begun before the change in territory effected by the change be tried?

261. Section 59. If there is a transfer of the prosecution or civil action from one federal court to another federal court, how is it made?

262. Section 60. What is the effect of the creation of a new district or division, or the transfer of any territory from one district or division to another district or division upon liens previously acquired on property within territory effected by the change?

263. Section 60. What provision is made in this section for filing a record of such liens in the court within whose territorial jurisdiction the property effected by the lien lies after the transfer of territory mentioned in question 262? What is the effect of such filing?

264. Section 61. May district judges appoint commissioners before whom appraisers of vessels, or goods and merchandise seized for breaches of any law of the United States, may be sworn? If so, how effectual is such an oath?

265. Section 62. When a territory is admitted as a state and a district court is established therein, what is done with the records of the cases pending in the highest court of the territory at the time of said admission, or which had already been tried therein?

266. Section 63. What is the duty of the judge of the federal district court and of the clerk of the territorial court in such a case? How may the clerk's duty be enforced, if he is unwilling to perform it?

267. When a territory is admitted as a state and a federal district court is established therein, of what cases pending in the trial

courts of the territory does the federal court take cognizance, hear and determine?

268. Section 65. In what manner shall receivers or managers appointed to care for property involved in a suit pending before any court of the United States manage the property?

269. Section 66. May such a receiver or manager be sued without the previous leave of the court in which he was appointed? If so, has the court appointing him any control over such a suit?

270. Section 67. May every person be appointed to or employed in any office or duty of a federal court?

271. Section 67. Does the fact that the judge making the appointment has decided that the same is properly made have any bearing upon the fact as to whether or not the appointment is valid?

272. Under what circumstances may a clerk or deputy clerk of a federal district court be appointed as a receiver or master in any case in such court?

III.

CIRCUIT COURT OF APPEALS.

273. Section 116. How many judicial circuits are there in the United States?

274. Section 116. What districts are included in each?

275. Section 117. How many judges sit in each circuit court of appeals? How many of these constitute a quorum?

276. Section 117. Is this court one of record?

277. Section 118. What is the salary of circuit judges?

278. Section 118. What are the duties of circuit judges?

279. Section 119. Do the justices of the Supreme Court ever sit as judges of the circuit courts of appeals? If so, who decides over what courts they shall sit?

280. Section 120. Who presides over the circuit courts of appeals?

281. Do judges of the federal district courts ever act as judges of the circuit courts of appeals?

282. Section 121. What is meant by "circuit justice" and "justice of a circuit," and what does the word "judge" include, as these terms are used in the chapter on Circuit Courts of Appeals in the Judicial Code?

283. Section 122. What powers has each circuit court of appeals in relation to the prescribing of the form of its seal, the form of writs and other process and procedure, and the establishment of rules of courts?

284. Sections 123-127. What are the powers of the United States marshals for the districts of the circuit courts of appeals in relation to these courts?

285. Section 124. Who appoints the clerks of circuit courts of appeals and what are the powers and duties of said clerks?

286. Section 125. How are deputy clerks of the circuit courts of appeals appointed and removed?

287. Section 125. Who takes the place of the clerk of a circuit court of appeals in case of his death?

288. Section 125. What liabilities does such a clerk's bond cover?

289. Section 125. What recourse has such a clerk or his representative after his death, when he, or his representative, pays for losses occasioned by the default of a deputy clerk?

Questions 290 through 295 deal with section 128 of the Judicial Code.

290. What are appeals and writs of error?

291. When is the decision of the federal district court final?

292. Does the circuit court of appeals ever have jurisdiction over a case in which a question of jurisdiction, or the construction or application of the Constitution of the United States is raised?

293. What is meant by "unless otherwise provided by law" as used in section 128?

294. When is the jurisdiction of a federal court dependent entirely upon diversity of citizenship?

295. In what cases is the decision of the circuit court of appeals final?

296. What is meant by "hearing in equity" as used in section 129?

297. What is meant by "an interlocutory order or decree" as used in section 129?

298. Within what time must the appeal mentioned in section 129 be taken?

299. When the appeal provided for in section 129 is taken, must a bond be provided?

300. Does the granting or the dissolution of an interlocutory injunction rest in the discretion of the court of original jurisdiction, or that of the appellate court?

301. May the circuit court of appeals decide the whole case when the appeal to it which is provided for in section 129 is taken?

302. What effect on the proceedings in the lower court has such an appeal?

303. Section 130. In what cases, generally, has the circuit court of appeals jurisdiction in bankruptcy cases?

304. Section 130. Is there any distinction between controversies arising in bankruptcy proceedings and proceedings in bankruptcy?

305. Sections 131 and 134. What circuit court of appeals is empowered to hear and determine writs of error and appeals from the United States Court for China, and from the federal district court for Alaska?

306. Sections 131 and 134. May any case be brought from those courts to the circuit court of appeals?

307. Section 131. In relation to the cases coming from the federal district court of Alaska, may the circuit court of appeals

certify any question to the Supreme Court of the United States? Where are those cases heard?

IV.

SUPREME COURT.

308. Section 215. Of how many judges does the supreme court consist?

309. Section 215. How many judges thereof constitute a quorum?

310. Section 216. How is the precedence of the judges of the supreme court determined?

311. Section 217. Upon whom devolves the duties and powers of the office of chief justice, when that office becomes vacant, or the chief justice is unable to perform his duties and powers?

312. Section 218. What is the salary of the judges of the supreme court?

313. Section 220. What kind of a bond must the clerk of the supreme court give? Under what circumstances may a change in his bond be required? Where must the bond be recorded and filed?

314. Section 221. How are deputy clerks of the supreme court appointed and removed?

315. Section 221. Who takes the place of the clerk of the supreme court in the case of his death?

316. Section 221. What liabilities does such a clerk's bond cover?

317. Section 221. What recourse has such a clerk, or his representative after his death, when he, or his representative, pays for losses occasioned by the default of a deputy clerk?

318. Section 224. What are the salary, powers, and duties of the marshal of the supreme court?

319. Section 230. How many terms of court shall the supreme court hold, and when shall they be held?

320. Section 231. What is the procedure when there is not a quorum of the supreme court?

321. Section 232. What orders may judges of the supreme court make while the court is adjourned until there shall be a quorum?

322. Section 233. In what cases has the supreme court exclusive, or original jurisdiction?

323. Section 233. What is meant by "public minister"?

324. Section 234. When may the supreme court issue a writ of prohibition or a writ of mandamus?

325. Section 234. What is a writ of prohibition, a writ of mandamus?

326. Section 235. How are issues of fact tried in the supreme court?

327. Section 235. What is meant by a trial by jury?

328. Section 237. What is the general rule as to the cases which

may be taken from a state court to the supreme court of the United States?

329. Section 237. What is meant by "the highest court of a state"?

330. Section 237. When is a judgment or decree of a state court final?

331. Section 237. When is drawn in question the validity of a treaty or statute of the United States, etc.?

332. Section 237. When is a writ of error, and when is a writ of certiorari, used under this section.

333. Section 237. What are writs of error and writs of certiorari? May one obtain them as of right?

334. Section 237. What is meant by "or otherwise"?

335. Section 239. Under what circumstances may appeals and writs of error be taken from the federal district courts directly to the supreme court?

336. Section 239. What kinds of questions may be certified to the supreme court by the circuit court of appeals?

337. Section 239. May more than one such question be certified at the same time?

338. Section 239. Is a certification by less than a quorum of the judges of a circuit court of appeals valid?

339. Section 239. Has a party a right to demand a certification?

340. Section 239. May a question of law, which has already been decided by the supreme court, be certified to it? What if the question was decided by an equally divided court?

341. Section 239. Under this section how much of the case may be passed upon by the supreme court in case of a certification?

342. Section 240. In what instances, within what time, and by what means, may the supreme court order a case to be certified to it?

343. Section 240. In case of such a certification, what is the power of the supreme court in relation to the case certified?

344. Section 241. In what instances, and within what time, may there be an appeal or writ of error from a circuit court of appeals to the supreme court? May there be one from an interlocutory order of the circuit court of appeals?

345. Section 242. In what cases may there be an appeal from the court of claims to the supreme court?

346. Section 243. Within what time must such appeals from the court of claims be taken?

347. Sections 244-246-247. In what cases, within what time, and how, may writs of error or appeals be taken from the supreme court of, and the United States District Court for, Porto Rico, the Supreme Court of Hawaii, and the federal District Court of Alaska?

348. Section 246. In what cases may writs of error and appeals be taken from the supreme courts of Hawaii and Porto Rico to the circuit courts of appeals?

349. Section 248. In what instances, within what time, and in

what manner, may judgments and decrees of the Supreme Court of the Philippine Islands be reviewed, etc., by the supreme court?

350. Section 250. In what instances, within what time, and in what manner, may judgments and decrees of the Court of Appeals of the District of Columbia be reviewed, etc., by the supreme court upon writ of error or appeal?

351. Sections 250 and 251. What decisions of the Court of Appeals of the District of Columbia are final? In those instances how may the decisions be reviewed, etc., by the supreme court, and what is the power of the supreme court in such cases?

352. Sections 252. What jurisdiction has the supreme court over matters relating to bankruptcy, and how is it exercised?

353. Section 253. What precedence is given criminal cases in the supreme court?

354. Section 254. Who pays the cost of printing the record in cases pending in the supreme court?

355. Section 255. May women practice before the supreme court?

V.

COURT OF CLAIMS.

356. Section 136. How many judges constitute the court of claims, how are they appointed, for what period do they hold their office, what oath must they take, and what is their salary?

357. Section 138. How many sessions must the court of claims hold annually, what is the length of their sessions, where must their sessions be held, what is a quorum of the court, and how many judges must concur to reach an effective decision?

358. Section 144. May members of congress, or resident commissioners, during their continuance in office practice in the court of claims?

359. Sections 145, 153 and 162. Of what cases does the court of claims have jurisdiction?

360. Section 146. What is the procedure when the United States sets up any set off, counterclaim, claims for damages, or other demand?

361. Sections 148, 149 and 151. What part may the court of claims be called upon to play in relation to claims pending against the federal government in congress or the various executive departments?

362. Section 154. What limit is there to the right to file or prosecute in the court of claims or supreme court any claim against one, who, at the time the claim arose, was acting or professing to act under the authority of the United States?

363. Section 155. What aliens may prosecute claims against the United States in the court of claims?

364. Section 156. What is the statute of limitations as to actions brought in the court of claims?

365. Section 157. To what extent may the court of claims punish for contempt?

366. Section 159. What must be set forth in petitions filed in the court of claims?

367. Section 160. What of those allegations may be traversed by the United States? What is the result of finding for the United States on those issues?

368. Section 161. Who has the burden of proving the loyalty or disloyalty of anyone to the United States during the civil war when that is an issue?

369. Section 164. What right has the court of claims to obtain information or papers from departments of the federal government?

370. Section 165. What is the proper procedure in the court of claims when it appears to the court that the facts set forth in the petition furnish no ground for relief?

371. Section 166. When may a claimant be directed by the court of claims to appear before a commissioner, and what is the result if he fails, upon reasonable notice, to do so?

372. Section 167. Where must testimony be taken in cases pending before the court of claims?

373. Section 168. What power has the court of claims to require witnesses to appear before it?

374. Section 169. When may the court of claims allow the filing of interrogatories?

375. Sections 172, 173 and 184. What is the effect upon one's right against the government if he commits a fraud in presenting his claim?

376. Sections 174 and 175. When may a new trial be granted by the court of claims?

377. Sections 180 and 181. What may one, who wants to settle his accounts with the United States, do after application for an accounting to the proper departmental head? How long after judgment is rendered by the United States may the federal government collect on the judgment?

378. Sections 181 and 182. Under what circumstances, and within what time, has one the right to appeal from the judgment of the court of claims?

379. Section 184. In cases of claims for supplies taken by, or furnished to, the military or naval forces of the United States in the civil war what must the petitioner aver?

380. Section 186. May persons of any color, and parties to or interested in a cause or proceeding in the court of claims be witnesses therein?

VI.

THE COURT OF CUSTOMS APPEALS.

381. Section 188. Of how many judges does the court of customs appeals consist, how are they appointed, what is their salary,

how is the presiding judge determined, how many judges constitute a quorum, and how many must concur to render an effective decision?

382. Section 188. In case of a vacancy, or temporary inability or disqualification of one or two judges of the court, what may be done?

383. Section 189. When and where are sessions of the court of claims held?

384. Sections 195, 196, 197 and 198. In what cases has the court of customs appeals jurisdiction?

385. Sections 195 and 196. How, and when, may cases tried before the court of customs appeals be certified to the supreme court?

386. Section 198. If an importer, owner, consignee, or agent of any imported merchandise, or the collector or secretary of the treasury, shall be dissatisfied with the decision of the board of general appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, what may they, or either of them do, and when and how may it be done?

VII.

PROVISIONS COMMON TO MORE THAN ONE COURT.

387. Section 256. In what cases have the courts of the United States exclusive jurisdiction?

388. Section 258. May any judge of the United States practice law while he holds that position?

389. Section 261. What is a writ of ne exeat? When, and by whom, may it be issued?

390. Section 262. What is a writ of scire facias? When and by whom may it be issued?

391. Section 262. What general power, is given by this section to the supreme and district courts of the United States to issue writs?

392. Section 263. Under what circumstances may restraining orders be granted by a federal district court? What is the duration of such orders? May security be demanded of the one obtaining such an order?

393. Sections 264 and 265. Under what circumstance, and where, generally, may writs of injunction or restraining orders be granted by judges of the federal courts? What effect have they upon the proceedings?

394. Section 266. What special provisions are made as to interlocutory injunctions in relation to the enforcement of state statutes, etc.?

395. Section 267. If there is an adequate remedy at law, may suits in equity be brought in the federal courts?

396. Section 268. What power have the federal courts to punish for contempts?

397. Section 268. What is meant by "in their presence" as used in this section?

398. Section 269. When may federal courts grant new trials?

399. Section 270. Who may hold persons to security in cases arising under the constitution and laws of the United States?

400. Section 271. What power have federal district courts and United States commissioners in relation to awards of consuls, vice consuls, or commercial agents of foreign nations having to do with differences between captains and crews of vessels belonging to the foreign nation whose interests are committed to his charge?

401. Section 272. By whom may parties present their cases in federal courts?

402. Sections 273 and 274. May clerks or marshals of territorial or federal courts act as attorneys?

403. Section 274-a. What is the effect of bringing, and what may be done, if one brings in a federal court an action in equity, which should have been brought in law?

404. Section 274-b. How are equitable defenses interposed in a federal court, and what is their effect when thus presented?

405. Section 274b. When is a replication filed in cases brought in federal courts?

406. Section 274-b. How is a judgment or decree reviewed by federal courts in cases in which affirmative relief is asked for in a replication? What type of judgment may be rendered by the appellate court?

407. Section 274c. To what extent may amendments be made to show diversity of citizenship, upon which one bases his right to get into the federal court?

VIII.

JURIES.

408. Section 275. What qualifications must, and exemptions do, federal jurors have?

409. Sections 276 and 277. How, and from where, are federal jurors drawn?

410. Section 278. May one be disqualified from serving as a federal juror on account of race, color, or previous condition of servitude?

411. Section 279. What are writs of venire facias mentioned in this section? How are they served?

412. Section 280. If from among the persons called to be jurors on a federal jury, enough are not found to complete a petit jury, how is the jury completed?

413. Section 281. How are special juries returned?

414. Section 282. How many persons constitute a grand jury?

415. Section 282. If, for any reason, the necessary number of

persons to complete a grand jury is not present, what is the proper procedure?

416. Section 283. What powers has the foreman of a federal grand jury, and who chooses him?

417. Section 284. When, and by whom, are federal grand juries summoned?

418. Section 284. Does this section extend the time which one may be imprisoned or held under recognizance before indictment found?

419. May federal district courts for states, district courts for territories, and the Supreme Court of the District of Columbia discharge their grand juries at their discretion?

420. Section 286. How long is it one's duty to serve as a petit juror? If one has served that length of time, may he be challenged on that ground?

421. Section 287. How many peremptory challenges have the parties to actions in federal courts?

422. Section 288. In prosecutions for bigamy, polygamy, or unlawful cohabitation, on what special ground may jurors be challenged? How are the facts on which such challenges are based proven?

IX.

CONCURRENT JURISDICTION.

423. If a state court has obtained jurisdiction over an action, may a federal court thereafter try the same questions between the same parties, no res being involved?

424. Is the answer the same if a res is involved, the state court having first obtained possession thereof?

425. When does a court have possession of a res?

X.

EQUITY RULES.

426. Rule 1. For what purposes are the district courts as courts of equity considered always open?

427. Rule 1. When may a district judge not sitting in court in term make, direct, and award, commissions, etc., not grantable of course?

428. Rule 2. When is the clerk's office open to receive and dispose of motions, etc., which are grantable of course?

429. Rule 3. What are the "Equity Docket," "Order Book," and "Equity Journal"?

430. Rule 4. What is insufficient, and what is sufficient, notice of an order?

431. Rule 5. What motions and applications are grantable of course by the clerk? By whom and upon what procedure may they be suspended, altered, or rescinded?

432. Rule 6. What provisions for motion days are made by the Equity Rules?

433. Rules 7, 8 and 9. When are subpoenas, writs of execution, writs of attachment, writs of sequestration, and writs of assistance used in equity cases?

434. Rule 8. Upon what condition will one be released from a writ of attachment?

435. Rule 8. When may a court direct an act to be done by another person for one originally ordered to do it?

436. Rule 10. May deficiency decrees in foreclosure proceeding be made by an equity court? If so, how are they enforced?

437. Rule 11. May relief be had in behalf of, or against, persons not parties to an equity suit?

438. Rule 12. When are subpoenas issued, what must one do to have them issued, what must they set forth, and how many subpoenas are issued when there is more than one defendant?

439. Rule 13. How are subpoenas served?

440. Rule 14. What is an alias subpoena, and when is one entitled to it?

441. Rule 15. By whom is every process served?

442. Rule 16. When must one answer, where must he file his answer, and what is the effect of failing to answer?

443. Rule 17. When a bill is taken pro confesso, how may a final decree be obtained?

444. Rule 17. If a bill is taken pro confesso, what may the defendant do to prevent a final decree being made?

445. Rule 18. Do technical forms of pleading still prevail in equity?

446. Rules 19, 28 and 34. May one amend a process, proceeding, or pleading, or file a supplemental pleading?

447. Rule 20. When may one be ordered to make a further or more particular statement of his pleadings?

448. Rule 21. How may one get scandalous or impertinent matter stricken from bills, answers, or other proceedings?

449. Rule 22. When may one have a case transferred from the equity to the law side of the federal district court?

450. Rule 23. May matters determinable at law arising in an equity suit be determined in that suit?

451. Rule 24. Must pleadings be signed by counsel? What is the import of the signature of counsel to a pleading?

452. Rule 25. What must a bill in equity contain?

453. Rule 26. When may causes of action be joined? When they are joined, may the court ever order separate trials?

454. Rule 27. When may a stockholder's bill be brought, and what must be alleged therein?

455. Rule 28. When may one amend his bill as of right? What must he do if he amends after any copy has issued from the clerk's office? What is the procedure if any defendant has filed a pleading?

456. Rule 29. How does one take advantage of defects of law

arising on the face of the bill? How does one take advantage of a defense not arising on the face of a bill?

457. Rule 30. What, in general, should be the form of an answer?

458. Rule 30. May an answer contain more than one defense? If so, must the defenses be consistent?

459. Rule 30. When are averments of a bill, which are not denied, deemed confessed? How may this result be obviated?

460. Rule 31. Under what circumstances, and within what time must a reply be made?

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